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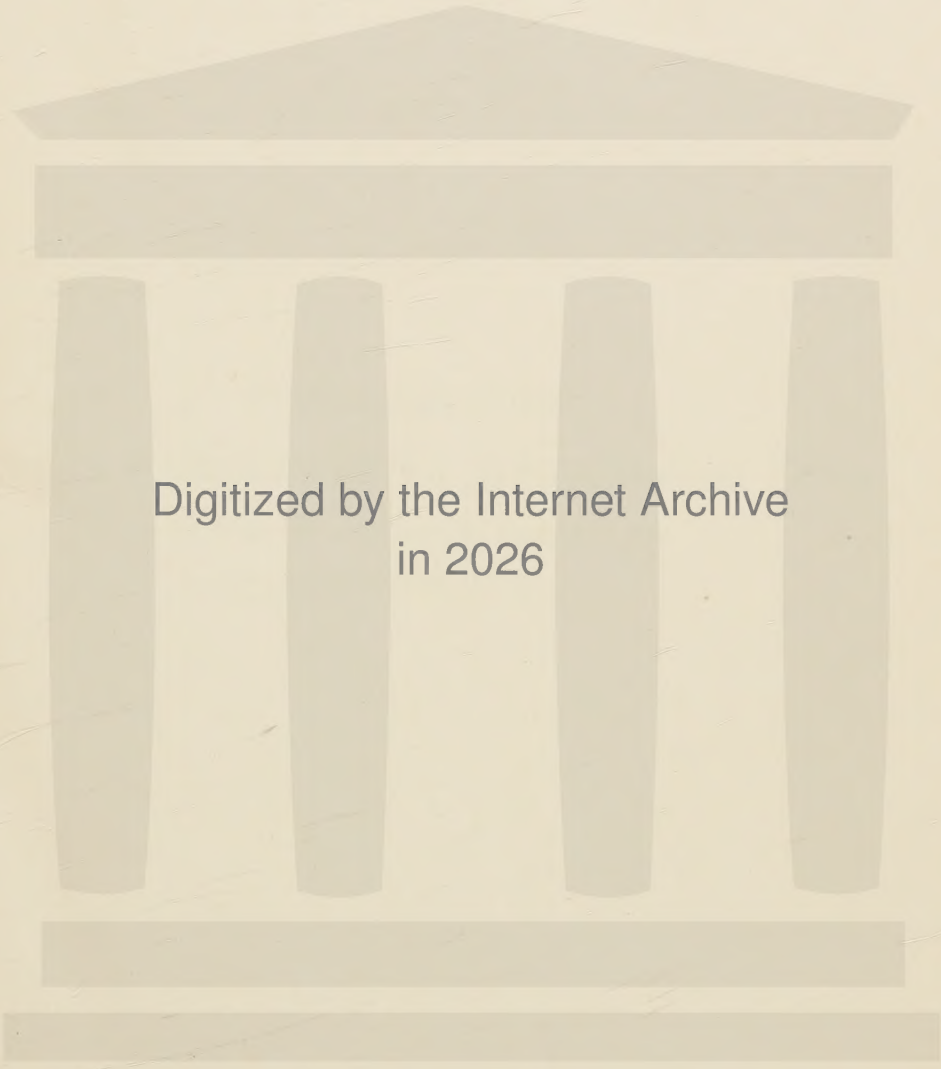
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Publications of the
Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW
WASHINGTON, D. C.

By the Editor of and Uniform with this Collection of Cases

Judicial Settlement of Controversies Between States of the American Union

An Analysis of Cases decided in the Supreme Court of the United States

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The United States of America

A Study in International Organization

I can not refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. (*Lord Campbell in Regina* v. *Millis, 10 Clark & Finnelly, 777, decided in 1844.*)

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. (*Chief Justice Fuller in Kansas* v. *Colorado, 185 United States, 125, 146–147, decided in 1902.*)

Confederations have existed in other countries than America; republics have been seen elsewhere than upon the shores of the New World; the representative system of government has been adopted in several states of Europe; but I am not aware that any nation of the globe has hitherto constituted a judicial power in the same manner as the Americans. (*Alexis de Tocqueville, De la Démocratie en Amérique, 2 Vols., 1835, Vol. I, p. 158.*)

The Supreme Court of the United States, which is the American Federal institution next claiming our attention, is not only a most interesting but a virtually unique creation of the founders of the Constitution. . . . The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or in the modern world. (*Sir Henry Sumner Maine, Popular Government, 1886, pp. 217–218.*)

American experience has made it an axiom in political science that no written constitution of government can hope to stand without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States. (*Edward John Phelps, The United States Supreme Court and the Sovereignty of the People, 1890, Orations and Essays, 1901, pp. 58–59.*)

The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign states submitted to judges who apply the test of conformity to established principles and rules of conduct embodied in our constitutions.

It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises. It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy. (*Elihu Root, Judicial Settlement of International Disputes, 1908, Addresses on International Subjects, 1916, pp. 151–2.*)

JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

COLLECTED AND EDITED

BY

JAMES BROWN SCOTT, A.M., J.U.D., LL.D.

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America has emerged from her struggle into tranquility and freedom, into affluence and credit.—The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciæ Gallicæ; Defence of the French Revolution and its English Admirers, 1791, p. 78.*)

IN TWO VOLUMES

VOL. I

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PRESS OF BYRON S. ADAMS
WASHINGTON, D. C.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States, this collection of cases, containing the contribution of the Supreme Court of the United States to the Judicial Settlement of International Disputes, is respectfully inscribed.

PREFATORY NOTE

From time to time, the undersigned has had occasion to consider those controversies between the States of the American Union, which have been decided in the Supreme Court of the United States; and like all others interested in these matters, he has been forced to consult the many volumes of Reports, through which these decisions run like threads of gold. It has occurred to him that it would be no mean service to the cause of judicial settlement between the States, if the decisions of these controversies were brought within narrower compass, so as to be readily accessible not only to the lawyer, but to the layman as well. They have therefore been gathered together and form the larger part of two volumes.

While this would be a sufficient reason for their publication, the present collection may properly be expected to subserve a larger purpose, for the Supreme Court of the United States is, in its origin, and in fact, an international tribunal, created by the States meeting by their delegates in conference, in Philadelphia, in 1787, which conference, commonly called the Constitutional Convention, as it drafted the Constitution of the United States, devised a court of the States, in which they consented to be sued for the settlement of the controversies bound to arise between and among them, renouncing the right of settlement by diplomacy, and wisely eschewing the resort to force. There was, in the opinion of its members then, as in the view of their fellow countrymen today, only a court of justice between the breakdown of diplomacy on the one hand, and the outbreak of war on the other.

In a little over a century, beginning with 1799, and ending with June 10, 1918, when the latest was considered in the Supreme Court, some eighty odd controversies between the States have been argued, debated and decided by that tribunal. As the result of argument, debate and decision, practice has been settled, and procedure adopted in the light of experience as applicable to States of the Society of Nations, as to States of the American Union. The essence, function and limits of judicial power have been noted and analyzed; the distinction between judicial power, on the one hand, and legislative and executive, or political power, on the other, has been made so clear in a long course of decisions, that he who runs may read, and the judicial settlement of justiciable disputes by a court has been justified by precept, demonstrated by practice and vindicated by results.

The judicial power to which the Constitution of the more perfect Union refers is that of the United States, and it must be made plain at the outset that we are dealing not with provinces but with States, which granted to the Union of their own creation certain sovereign powers, while retaining the exercise of such powers as they did not expressly or impliedly grant to the Government of that Union, or which they did not prohibit to themselves. Therefore, some leading decisions of the Supreme Court have been prefixed, dealing with the origin and nature of the United States, and of the States composing the American Union.

The judicial power, however, is not exercised in the abstract but in the concrete case, controversy or suit as it arises and is presented in actual litigation to the Court. Therefore certain cases have been added showing the sense in which these terms are used in the Constitution in order that the judicial power shall extend to the dispute and the Court decide the issue.

The case, controversy or suit is, as expressly or impliedly stated in the Constitution, one involving common law, equity, admiralty, maritime and interna-

tional law. Therefore cases have been selected to show how and to what extent the judicial power extends to and embraces them within its jurisdiction.

Still other cases have been chosen showing, what indeed does not need demonstration, the immunity of nations and States from suit except by their express consent, which, fortunately for us, has been given in general terms in the Constitution of these United States.

By the Eleventh Amendment to the Constitution the judicial power of the United States was withdrawn from suits by citizens of a State against other States of the Union; it has, however, been thought advisable to include these earlier cases, interesting in themselves and important in that they furnish the procedure later followed in suits between States. Some cases in which attempts were made by private suitors to reach the States through their officials, and thus to circumvent the amendment, have been added, in order that it may be seen how a court of limited jurisdiction can be trusted to keep within the spirit as well as the letter of its limitation.

It will be observed that the first volume carries the cases through the first final decision in a controversy between States and at the same time the procedure to be followed in reaching a decision is devised, ascertained and set forth in detail in the judgments. The second volume may therefore be looked upon as decrees of the court after the principle had been established and the procedure adopted and as so many variations in the exercise of the jurisdiction conferred by the Constitution upon the Supreme Court in the matter of controversies between States.

The fact that two volumes were required for the text of the controversies between States, even although small quarto was employed, made it possible to prefix certain preliminary matter which is believed to be not only useful but also essential in order to enable advocates of judicial settlement to understand the controversies and to read the cases involving them with pleasure as well as instruction.

It is believed that a perusal of this preliminary material, and a careful consideration of the controversies between the States, decided in the Supreme Court, will convince the layman, as well as the practitioner, that what forty-eight States of the American Union do, a like number of States forming the Society of Nations can also do, so that the Supreme Court of the one, and, in the future, an International Court of Justice of the other, will, in appropriate instances, decide controversies between the States of the American Union and disputes between members of the Society of Nations according to that due process of law which obtains between individuals, and without which, neither States nor Nations can hope to endure.

To many it seems that the Court of the American Union—in which coercive measures are not taken to compel the appearance of the defendant State, but, in its absence, permission is given to the plaintiff State to proceed *ex parte,* and in which hitherto no judgment against a State has been executed by force either because it was felt that no power existed so to do or its exercise was not considered necessary—is the prototype of that tribunal which they would like to see created by the Society of Nations, "accessible to all, in the midst of the independent Powers."

JAMES BROWN SCOTT.

WASHINGTON, D. C.
September 30, 1918.

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The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. (*Constitution of the United States, Article III, Section 1.*)

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. (*Constitution of the United States, Article III, Section 2.*)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (*Constitution of the United States, Article VI.*)

The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; . . . (*Constitution of the United States, Article III, Section 2.*)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (*Constitution of the United States, XIth Amendment.*)

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. (*Constitution of the United States, Article III, Section 2.*)

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INTRODUCTION

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end, it may be a government of laws, and not of men. (*Constitution of Massachusetts, 1780, Part I, Art. 30; The Constitutions of the Several Independent States of America, etc., Published by order of Congress, and printed by Francis Bailey, Philadelphia, 1781, p. 14.*)

The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second, to approve and execute them, and the third to expound and enforce them. (*Mr. Justice Story in Martin* v. *Hunter, 1 Wheaton, 304, 329, decided in 1816.*)

1. The federal government is one of *enumerated powers,* the Constitution being the measure thereof, and the powers not delegated thereby being reserved to the individual States or to the people. . . .

2. The powers of sovereignty not thus delegated rest in the people of the individual States, who confer the same for ordinary exercise, with such exceptions and limitations and under such regulations as they see fit to establish, upon the departments and officers of government which by their constitutions they create for the States respectively.

3. The municipal organizations exercise a delegated authority under the State, and may also be regarded as governments of enumerated powers. The State legislative authority shapes their charters according to its view of what is proper and politic, and it determines their territorial extent. (*Mr. Justice Cooley, of the Supreme Court of Michigan, in Mr. Justice Story's Commentaries on the Constitution of the United States, 4th ed., 1874, Vol. I, p. 196.*)

America has emerged from her struggle into tranquility and freedom, into affluence and credit.—The authors of her Constitution have constructed a great permanent *experimental answer* to the sophisms and declamations of the detractors of liberty. (*Sir James Mackintosh, Vindiciæ Gallicæ; Defence of the French Revolution and its English Admirers, 1791, p. 78.*)

A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts, nor the Legislature or General Court of Massachusetts can legally exercise a single power which is inconsistent with the articles of the Constitution. (*A. V. Dicey, The Law of the Constitution, 1885, p. 132.*)

But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be the "law of the land," and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal state. (*A. V. Dicey, The Law of the Constitution, 1885, p. 152.*)

The Constitution of the United States of America is much the most important political instrument of modern times. (*Sir Henry Sumner Maine, Popular Government, 1886, p. 196.*)

The Declaration of Independence—1776[1]

In Congress, July 4, 1776.

The unanimous Declaration of the thirteen united States of America.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . .

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

New Hampshire

Josiah Bartlett	Wm. Whipple	Matthew Thornton

Massachusetts Bay

Saml. Adams	John Adams	Robt. Treat Paine
	Elbridge Gerry	

[1] Revised Statutes of the United States, 1878, p. 3.—Editor.

Rhode Island

STEP. HOPKINS — WILLIAM ELLERY

Connecticut

ROGER SHERMAN — SAM'EL HUNTINGTON — WM. WILLIAMS
OLIVER WOLCOTT

New York

WM. FLOYD — PHIL. LIVINGSTON — FRANS. LEWIS
LEWIS MORRIS

New Jersey

RICHD. STOCKTON — JNO. WITHERSPOON — FRAS. HOPKINSON
JOHN HART — ABRA. CLARK

Pennsylvania

ROBT. MORRIS — BENJAMIN RUSH — BENJA. FRANKLIN
JOHN MORTON — GEO. CLYMER — JAS. SMITH
GEO. TAYLOR — JAMES WILSON — GEO. ROSS

Delaware

CAESAR RODNEY — GEO. READ — THO. M'KEAN

Maryland

SAMUEL CHASE — WM. PACA — THOS. STONE
CHARLES CARROLL OF CARROLLTON

Virginia

GEORGE WYTHE — RICHARD HENRY LEE — TH. JEFFERSON
BENJ. HARRISON — THOS. NELSON, JR. — FRANCIS LIGHTFOOT LEE
CARTER BRAXTON

North Carolina

WM. HOOPER — JOSEPH HEWES — JOHN PENN

South Carolina

EDWARD RUTLEDGE — THOS. HEYWARD, Junr. — THOMAS LYNCH, Junr.
ARTHUR MIDDLETON

Georgia

BUTTON GWINNETT — LYMAN HALL — GEO. WALTON

Articles of Confederation—1777[1]

To all to Whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of Our Lord One Thousand Seven Hundred and Seventy-seven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the Words following, viz.

Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

Article I. The stile of this confederacy shall be "The United States of America."

Article II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United

[1] Revised Statutes of the United States, 1878, p. 7.—Editor.

States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in

public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise

between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the numbers shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights and measures throughout the United States.—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all

the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time

within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislature of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it hath pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress.

Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

On the part & behalf of the State of New Hampshire.

JOSIAH BARTLETT, JOHN WENTWORTH, Junr., August 8th, 1778.

On the part and behalf of the State of Massachusetts Bay.

JOHN HANCOCK, SAMUEL ADAMS, ELBRIDGE GERRY, FRANCIS DANA, JAMES LEVELL, SAMUEL HOLTEN.

On the part and behalf of the State of Rhode Island and Providence Plantations.

WILLIAM ELLERY, HENRY MARCHANT, JOHN COLLINS.

On the part and behalf of the State of Connecticut.

ROGER SHERMAN, TITUS HOSMER, SAMUEL HUNTINGTON, ANDREW ADAMS, OLIVER WOLCOTT,

On the part and behalf of the State of New York.

JAS. DUANE, FRA. LEWIS, GOUV. MORRIS, WM. DUER,

On the part and in behalf of the State of New Jersey, Novr. 26, 1778.

JNO. WITHERSPOON, NATHL. SCUDDER.

On the part and behalf of the State of Pennsylvania.

ROBT. MORRIS, WILLIAM CLINGAN, DANIEL ROBERDEAU, JOSEPH REED, 22d July, 1778. JONA. BAYARD SMITH,

On the part & behalf of the State of Delaware.

THO. M'KEAN, Feby. 12, 1779. JOHN DICKINSON, May 5th, 1779. NICHOLAS VAN DYKE.

On the part and behalf of the State of Maryland.

JOHN HANSON, March 1, 1781. DANIEL CARROLL, Mar. 1, 1781.

On the part and behalf of the State of Virginia.

RICHARD HENRY LEE, JNO. HARVIE, JOHN BANISTER, FRANCIS LIGHTFOOT LEE. THOMAS ADAMS,

On the part and behalf of the State of No. Carolina.

JOHN PENN, July 21st, 1778. CORNS. HARNETT, JNO. WILLIAMS.

On the part and behalf of the State of South Carolina.

HENRY LAURENS, RICHD. HUTSON, WILLIAM HENRY DRAYTON, THOS. HEYWARD, Junr. JNO. MATHEWS,

On the part & behalf of the State of Georgia.

JNO. WALTON, 24th July, 1778. EDWARD. TELFAIR, EDWD. LANGWORTHY.

The Constitution of the United States—1787[1]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. (1)The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

(2)No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

(3)[2][Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

(4)When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

(5)The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

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[1] The text of the Constitution is printed as it appears in Senate Document No. 12, 63d Congress, 1st session, and the notes appended to the articles of the Constitution and to the amendments are taken from the same document unless otherwise indicated.

The references in this document to decisions of the Supreme Court construing the clauses of the Constitution have been omitted.—Editor.

[2] The clause included in brackets is amended by the fourteenth amendment, second section.

SECTION 3. [(1)The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.][1]

(2)Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments [until the next Meeting of the Legislature, which shall then fill such Vacancies].

(3)No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

(4)The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

(5)The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

(6)The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

(7)Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. (1)The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(2)The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. (1)Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

(2)Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

(3)Each House shall keep a Journal of its Proceedings, and from time to

[1] The first paragraph of section three of Article 1, of the Constitution of the United States, and so much of paragraph two of the same section as relates to filling vacancies are amended by the seventeenth amendment to the Constitution.

time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4]Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. [1]The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2]No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. [1]All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2]Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3]Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power [1]To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2]To borrow money on the credit of the United States;

[3]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4]To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5]To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6]To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7]To establish Post Offices and post Roads;

[8]To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9]To constitute Tribunals inferior to the supreme Court;

[10]To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

[11]To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12]To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13]To provide and maintain a Navy;

[14]To make Rules for the Government and Regulation of the land and naval Forces;

[15]To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16]To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17]To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

[18]To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. [1]The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceding ten dollars for each Person.

[2]The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3]No Bill of Attainder or ex post facto Law shall be passed.

[1](4)No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

(5)No Tax or Duty shall be laid on any Articles exported from any State.

(6)No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

(7)No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

(8)No Title of Nobility shall be granted by the United States; And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. (1)No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

(2)No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and the Controul of the Congress.

(3)No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section 1. (1)The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

(2)Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[2][The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed

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[1] See XVI Amendment.

[2] This clause has been superseded by the twelfth amendment.

to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

[3]The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[4]No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[5]In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[6]The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[7]Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. [1]The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2]He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3]The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2]The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

[3]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand

eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

Article VI.

(1)All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

(2)This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(3)The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. **In Witness** whereof We have hereunto subscribed our Names.[1]

G°: WASHINGTON—
Presidt. and deputy from Virginia

New Hampshire.

John Langdon — Nicholas Gilman

Massachusetts.

Nathaniel Gorham — Rufus King

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[1] On the 4th of March, 1789, the day which had been fixed for commencing the operations of Government under the new Constitution, it had been ratified by the conventions chosen in each State to consider it, as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; and New York, July 26, 1788.

The President informed Congress, on the 28th of January, 1790, that South Carolina had ratified the Constitution November 21, 1789; and he informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1789. Vermont, in convention, ratified the Constitution January 10, 1789, and was, by an act of Congress approved February 19, 1791, "received and admitted into this Union as a new and entire member of the United States." (*Revised Statutes of the United States,* 1878, p. 17, *note.*)—Editor.

Connecticut

Wm. Saml. Johnson — Roger Sherman

New York

Alexander Hamilton

New Jersey

Wil: Livingston — David Brearley — Wm. Patterson
Jona: Dayton

Pennsylvania

B. Franklin — Robt. Morris — Thos. Fitzsimons
James Wilson — Thomas Mifflin — Geo. Clymer
Jared Ingersoll — Gouv Morris

Delaware

Geo: Read — John Dickinson — Jaco: Broom
Gunning Bedford jun — Richard Bassett

Maryland

James McHenry — Danl. Carroll — Dans of St Thos Jenifer

Virginia

John Blair— — James Madison Jr.

North Carolina

Wm Blount — Hu Williamson — Richd Dobbs Spaight,

South Carolina

J. Rutledge — Charles Pinckney — Pierce Butler
Charles Cotesworth Pinckney

Georgia.

William Few — Abr Baldwin

Attest WILLIAM JACKSON *Secretary*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

[ARTICLE I.][1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercises thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

[Article VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

[Article VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[Article VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[Article IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[Article X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XI.[1]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article XII.[2]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as

[1] The eleventh amendment was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

[2] The twelfth amendment, in lieu of the original third paragraph of the first section of the second article, was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Article XIII.[1]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.[2]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States

[1] The thirteenth amendment was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States.

[2] The fourteenth amendment was, in a proclamation of the Secretary of State, dated the 28th of July, 1868, declared to have been ratified by the legislatures of thirty of the thirty-six States.

according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI.[2]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

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[1] The fifteenth amendment was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States.

[2] The sixteenth amendment was declared, in an announcement by the Secretary of State, dated February 25, 1913, to have been ratified by the legislatures of thirty-eight of the forty-eight States.

Article XVII.[1]

(1)The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

(2)When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

(3)This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

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[1] The seventeenth amendment was declared, in an announcement by the Secretary of State, dated May 31, 1913, to have been ratified by the legislatures of thirty-six of the forty-eight States.

I

THE UNITED STATES, THE STATES, THE TERRITORIES FORMING THE AMERICAN UNION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (*Constitution of the United States, IXth Amendment.*)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (*Constitution of the United States, Xth Amendment.*)

No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. (*Chief Justice Marshall in McCulloch* v. *Maryland, 4 Wheaton, 316, 403, decided in 1819.*)

It must be recollected, that previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respects, sovereign. (*Chief Justice Marshall in Sturges* v. *Crowninshield, 4 Wheaton, 122, 192, decided in 1819.*)

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. (*Chief Justice Marshall in Gibbons* v. *Ogden, 9 Wheaton, 1, 187, decided in 1824.*)

Every State in the *Union,* in every instance where its sovereignty has not been delegated to the *United States,* I consider to be as compleatly sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but such *as the States have surrendered to them:* Of course the part not surrendered must remain as it did before. (*Mr. Justice Iredell in Chisholm* v. *Georgia, 2 Dallas, 419, 435, decided in 1793.*)

On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or *to the people.*"

The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. (*Mr. Justice Story in Martin* v. *Hunter, 1 Wheaton, 304, 325–326, decided in 1816.*)

In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. (*Chief Justice Marshall in McCulloch* v. *Maryland, 4 Wheaton, 316, 410, decided in 1819.*)

Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved

to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. (*Chief Justice Chase in Texas* v. *White, 7 Wallace, 700, 725, decided in 1868.*)

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States. (*Mr. Justice Nelson in Collector* v. *Day, 11 Wallace, 113, 124, decided in 1870.*)

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this—a duty oftentimes of great delicacy and difficulty. (*Mr. Justice Brewer in South Carolina* v. *United States, 199 United States, 437, 448, decided in 1905.*)

Respublica v. Cornelius Sweers.

Supreme Court of Pennsylvania, 1779.

[1 *Dallas,* 41.]

The *United States* became a body corporate from the period of their association.
An indictment may be maintained for a cheat of such a nature as may prejudice, although it does not charge that any person was actually defrauded.

At a Court of *Oyer and Terminer* &c. held at *Philadelphia* in *November,* 1778, the Defendant was indicted for *Forgery* upon two bills. The proceedings were removed by *certiorari,* returnable into this court, on the 5th day of *December* following; and the issues, on *not guilty* pleaded were tried before a Special Jury on the 14th *April,* 1779, when the Defendant was convicted upon both indictments. Afterwards he filed reasons in arrest of judgment, of which a recapitulation will be found in the sentence of the Court; and these reasons were argued, and overruled, on the 19th day of the same month.

The *first* indictment was for *altering* a bill of parcels and receipt given by *Margaret Duncan,* for goods bought from her, with intent to defraud the *United States*; . . .

*43 * The *second* indictment was for *forging* a receipt, purporting to be a receipt from one *Adam Foulke,* with intent to defraud the *United States.* . . .[1]

*44 * The prisoner being brought before the Court to receive sentence, McKean,[2] *Chief Justice,* addressed him to the following effect:

Cornelius Sweers:—After a fair and full trial, you have been convicted of the crime of *Forgery,* upon two indictments, by a Special Jury of your country. The offence stated in the *first* indictment, is that of altering a receipt given by *Margaret Duncan;* and the charge contained in the *second* indictment, is that of forging a receipt, purporting to be the receipt of *Adam Foulke.* Your counsel have taken several exceptions to the form and substance of these indictments, upon a motion in arrest of judgment.

The *first* exception was, "that, at the time of the offence charged, the *United States* were not a body corporate known in law." But the Court are of a different opinion. From the moment of their association, the *United States* necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In *England,* the king, lords, and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created. An indictment, however, may be sufficiently maintained upon "an intent to deceive my liege subjects;" and to that purpose there is a positive authority, not referred to by the counsel, where a person was in-

[1] The defendant Sweers, before and after indictment, "was a Deputy Commissary-General of military stores, in the Armies of the United States of America," and was indicted as such in a court of the State of Pennsylvania at the instance of the United States which did not then have civil courts of their own.—Editor.

[2] It is of interest to note, in this connection, that Chief Justice McKean was a signer of the Declaration of Independence.—Editor.

dicted, for having in his custody a piece of base metal, in the similitude of a sixpence, knowing it to be base, with intent to defraud the liege subjects &c.

The *second* exception was, "that the charges in the indictments, were not direct and positive, but only argumentative." On this point we can not hesitate to declare, that the charges appear to us to be as direct and positive, as it was possible to express them.

The *third* exception was, "that the indictments do not charge that any person was actually defrauded." But in the *King versus Webb,* 2 *Ld. Ray,* 1461, all the judges declared, that if the cheat be prejudicial, that is, of such a nature
*45 as may prejudice, an indictment * would well lie. In the case of forgery, properly so called, which includes only records, deeds, wills, or public instruments, it may, perhaps, be necessary that some person should be actually prejudiced. This rule, however, does not extend to cheats of the present description; in which it is sufficient, that the act be of a prejudicial nature.

Upon the whole, we are of opinion, that your conviction has been legal, as well as just; and, therefore, it only remains to pronounce the sentence of the court.

Sentence, on the first indictment:—A fine of £70. and imprisonment until the 4th of July, the anniversary of *American* Independence.

Sentence, on the second indictment: A fine of £1020. and imprisonment until the next annual election for *Pennsylvania,* and standing in the pillory for one hour.

Ware, Administrator of Jones, Plaintiff in Error, v. Hylton, et al.

Supreme Court of the United States, 1796.

[3 *Dallas,* 199.]

The State of Virginia was, after the Declaration of Independence, a sovereign State and, as such, entitled to all the rights and privileges accorded, and subjected to the duties prescribed, by the law of nations. Chase, J.

ERROR from the Circuit Court for the District of *Virginia.* The action was brought by *William Jones* (but as he died, *pendente lite,* his Administrator was duly substituted as Plaintiff in the cause), surviving partner of *Farrel* and *Jones,* subjects of the king of *Great Britain,* against *Daniel Hylton & Co.,* and *Francis Eppes,* citizens of *Virginia,* on a bond, for the penal sum of £2976, 11*s.* 6*d.* sterling, dated the 7th *July,* 1774.

*207 * The general question was—whether by paying a debt due before the war, from an *American* citizen to *British* subjects, into the loan office of *Virginia,* in pursuance of the law of that state, the debtor was discharged from his creditor? And the argument took the following general course.

E. Tilghman, for the Plaintiff in error. . . . There is, indeed, no controverting the general right of a belligerent power to confiscate the property of its enemy, in ordinary cases; though the modern policy of nations abstains

from the exercise of that right, in respect to debts. *Vatt.* B. 3. §77. *p.* 484. . . .

*208 * But supposing *Virginia* had the right of confiscation in the present instance, two grounds for judicial inquiry will still remain to be explored:—1st, Whether an act of the Legislature of that State has been passed, and so acted upon, as ever to have created an impediment to the Plaintiff's recovering the debt in controversy? And 2d. Whether such impediment, if it ever existed, has been lawfully removed?

*210 * *Marshall* (of *Virginia*), for the Defendant in error. The case resolves itself into two general propositions: 1st, That the act of Assembly of *Virginia* is a bar to the recovery of the debt, independently of the treaty. 2d, That the treaty does not remove the bar.

I. That the act of Assembly of *Virginia* is a bar to the recovery of the debt, introduces two subjects for consideration: 1st. Whether the Legislature had power to extinguish the debt? 2d. Whether the Legislature had exercised that power.

1st. It has been conceded, that independent nations have, in general, the right of confiscation; and that *Virginia,* at the time of passing her law, was an independent nation.[1] But, it is contended, that from the peculiar circumstances of the war, the citizens of each of the contending nations, having been members of the same government, the general right of confiscation did not apply, and ought not to be exercised. It is not, however, necessary for the Defendant in error to shew a parallel case in history; since, it is incumbent on those, who wish to impair the sovereignty of *Virginia,* to establish on principle, or precedent, the justice of their exception. *That State* being engaged in a war, necessarily possessed the powers of war; and confiscation is one of those powers, weakening the party against whom it is employed, and strengthening the party that employs it. War, indeed, is a state of force; and no tribunal can decide between the belligerent

*211 powers. . . . * The legislative authority of any country, can only be restrained by its own municipal constitution; this is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution. . . .

*220 * CHASE, *Justice.*[2]—The Defendants in error, on the 7th day of *July,* 1774, passed their penal bond to *Farrel* and *Jones,* for the payment of £.2,976 11. 6. of good *British* money; but the condition of the bond, of the time of payment, does not appear on the record.

On the 20th *October,* 1777, the legislature of the commonwealth of *Virginia,*

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[1] Such was the opinion of Marshall at the bar, and it was in accord with opinions expressed by him from the bench in *Sturges* v. *Crowninshield* and *Gibbons* v. *Ogden,* as appears from the extracts from these cases prefixed to this section, *ante.,* p. 1.—Editor.

[2] Only that part of the opinion of Mr. Justice Chase is given which deals with the right of Virginia as a sovereign State to pass the statute in question.

After quoting a portion of the opinion of Mr. Justice Chase from *Ware* v. *Hylton* to the effect that a treaty is a supreme law of the land, as declared by Article VI of the Constitution, Mr. Justice Swayne, speaking for a unanimous court in *Hauenstine* v. *Lynham* (100 U. S. 483, 489), decided in 1879, said:

"We have quoted from the opinion of Mr. Justice Chase in that case, . . . because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country."

It may be recalled, in this connection, that Mr. Justice Chase was a signer of the Declaration of Independence.—Editor.

passed a law to *sequester British* property. In the 3d section of the law, it was enacted, "that it should be *lawful* for any citizen of *Virginia,* owing money to a subject of *Great Britain,* to *pay* the same, or any part thereof, from time to time, as he should think fit, into the loan office, taking thereout a certificate for the *same,* in the *name* of the *creditor,* with an indorsement, under the hand of the commissioner of said office, expressing the name of the *payer;*
*221 and * shall deliver such certificate to the governor and the council, *whose receipt* shall *discharge him* from so much of the debt. And the governor and the council shall, in like manner, lay before the General Assembly, once in every year, an account of these *certificates,* specifying the names of the persons *by,* and *for* whom they were *paid;* and shall see to the safe keeping of the *same; subject to the future directions of the legislature:* provided, that the governor and the council may make such allowance, as they shall think reasonable, out of the INTEREST of the money so paid into the loan office, to the wives and children, residing in the state, of *such creditor.*

On the 26th of *April,* 1780, the Defendants in error paid into the loan office of *Virginia, part* of their debt, to wit, $3,111 1/9, equal to £.933 14 0 *Virginia* currency; and obtained a certificate from the commissioners of the loan office, and a receipt from the governor and the council of *Virginia,* agreeably to the above, in part recited law.

The Defendants in error being sued, on the above bond, in the Circuit Court of *Virginia,* pleaded the above law, and the payment above stated, in bar of so much of the Plaintiff's debt. The plaintiff, to avoid this bar, replied the fourth article of the Definitive Treaty of Peace between *Great Britain* and the *United States,* of the 3d of *September,* 1783. To this replication, there was a general demurrer and joinder. The Circuit Court allowed the demurrer, and the plaintiff brought the present writ of error.

The case is of very great importance, not only from the property that depends on the decision, but because the effect and operation of the treaty are necessarily involved. I wished to decline sitting in the cause, as I had been counsel, some years ago, in a suit in *Maryland,* in favour of *American debtors;* and I consulted with my brethren, who *unanimously* advised me not to withdraw from the bench. I have endeavored to divest myself of all *former* prejudices, and to form an opinion with impartiality. I have diligently attended to the arguments of the learned counsel, who debated the several questions, that were made in the cause, with great legal ability, ingenuity and skill. I have given the subject, since the argument, my deliberate investigation, and shall, (as briefly as the case will permit,) deliver the result of it with great diffidence, and the highest repect for those, who entertain a different opinion. I solicit, and I hope I shall meet with, a candid allowance for the many imperfections, which may be discovered in observations hastily drawn up, in the intervals of attendance in court, and the consideration of other very important cases.

The *first* point raised by the counsel for the Plaintiff in error was, "that
*222 the legislature of *Virginia* had no *right* to make * the law of the 20th *October,* 1777, above in part recited. If this objection is established, the judgment of the Circuit Court must be reversed; because it destroys the Defendant's plea in bar, and leaves him without defence to the Plaintiff's action.

This objection was maintained on *different* grounds by the Plaintiff's counsel.

One of them (*Mr. Tilghman*) contended, that the legislature of *Virginia* had *no right* to confiscate *any British* property, because *Virginia* was *part* of the *dismembered empire* of *Great Britain,* and the Plaintiff and Defendants were, all of them, *members* of the *British* nation, *when the debt was contracted,* and therefore, that the laws of independent nations do not apply to the case; and, if applicable, that the legislature of *Virginia* was not justified by the *modern* law and practice of European nations, in confiscating private debts. In support of this opinion, he cited *Vattel, lib.* 3. *c.* 5. § 77, who expresses himself thus: "The sovereign has naturally the *same* right over what his subjects may be indebted to enemies. Therefore, he may confiscate *debts of this nature,* if the term of payment happen in the time of war. But *at present,* in regard to the advantage and safety of *Commerce,* all the sovereigns of Europe have departed from this *rigour;* and, as this *custom* has been *generally* received, he who should act contrary to it, would injure the *public faith;* for strangers trusted *his* subjects, only from a firm persuasion, that the *general custom* would be observed."

The other counsel for the Plaintiff in error (Mr. *Lewis*) denied any power in the *Virginia* legislature, to confiscate *any British* property, because all such power belonged *exclusively* to Congress; and he contended, that if *Virginia* had a power of confiscation, yet, it did not extend to the confiscation of *debts* by the *modern* law and practice of nations.

I would premise that this objection against the *right* of the *Viriginia* legislature to confiscate *British* property, (and especially *debts*) is made on the part of *British* subjects, and *after the treaty of peace,* and not by the government of the *United States.* I would also remark, that the law of *Virginia* was made *after* the declaration of independence by *Virginia,* and also by Congress; and several years *before* the Confederation of the *United States,* which, although agreed to by Congress on the 15th of *November,* 1777, and assented to by ten states, in 1778, was only *finally* completed and ratified on the 1st of *March,* 1781.

I am of opinion that the *exclusive right* of confiscating, during the war, *all and every species of British property,* within the territorial limits of *Virginia,* resided only in the Legislature of that commonwealth. I shall hereafter consider whether the law of the 20th of *October* 1777, operated to *confiscate* or *extinguish*
*223 * *British* debts, contracted before the war. It is worthy of remembrance, that Delegates and Representatives were elected, by the people of the several counties and corporations of *Virginia,* to meet in *general convention,* for the purpose of framing a NEW government, by the authority of *the people only;* and that the said Convention met on the 6th of *May,* and continued in session until the 5th of *July,* 1776; and, in virtue of their *delegated* power, established a constitution, or form of government, to regulate and determine by *whom,* and in *what manner,* the authority of *the people* of *Virginia* was *thereafter* to be executed. As *the people* of that country were the genuine source and fountain of *all* power, that could be *rightfully* exercised within its limits; they had therefore an unquestionable *right* to grant it to whom they pleased, and under what restrictions or limitations they thought proper. *The people* of *Virginia,* by their Constitution or *fundamental* law, granted and delegated all their Supreme civil power to a *Legislature,* an *Executive* and a *Judiciary;* The *first* to make; the *second* to execute; and the last to declare or expound, the laws of the Commonwealth. This abolition of the *Old Government,* and this establishment of a *new* one was

the highest act of power that any people can exercise. From the moment *the people* of *Virginia* exercised *this power,* all dependence on, and connection with *Great Britain* absolutely and forever ceased; and no *formal* declaration of Independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes, which impelled the separation; and was proper to give notice of the event to the nations of *Europe.*—I hold it as unquestionable, that the *Legislature* of *Virginia* established as I have stated by the authority of the people, was for ever thereafter invested with the *supreme and sovereign power of the state,* and with authority to make any *Laws* in their discretion, to affect the *lives, liberties,* and *property* of all the citizens of that Commonwealth, *with this exception only,* that such laws should not be repugnant to the *Constitution,* or *fundamental* law, which could be subject only to the controul of the *body of the nation,* in cases not to be defined, and which *will always* provide for themselves. The *legislative* power of every nation can only be restrained by its *own constitution:* and it is the duty of its courts of justice not to question the *validity* of any law made in pursuance of the constitution. There is no question but the act of the *Virginia* Legislature (of the 20th of *October* 1777) was within the authority granted to them by *the people* of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of *Virginia,* and, in my opinion, on the courts of the *United States.* If *Vir-*
*224 *ginia* as a sovereign State, violated the ancient or modern * law of nations, in making the law of the 20th of *October* 1777, she was answerable in her *political* capacity to the *British* nation, whose subjects have been injured in consequence of that law. Suppose a general right to confiscate *British* property, is admitted to be in Congress, and Congress had confiscated all *British* property within the *United States,* including private debts: would it be permitted to contend in any court of the *United States,* that Congress had no power to confiscate such *debts,* by the *modern* law of nations? If the *right* is conceded to be in Congress, it necessarily follows, that she is the judge of the exercise of the right, as to the *extent, mode,* and *manner.* The same reasoning is strictly applicable to *Virginia,* if considered a *sovereign nation;* provided she had not delegated such power to Congress, before the making of the law of *October* 1777, which I will hereafter consider.

In *June* 1776, the Convention of *Virginia formally* declared, that *Virginia* was a free, sovereign, and independent state; and on the 4th of *July,* 1776, following, the *United States,* in Congress assembled, declared the *Thirteen United Colonies* free and independent states; and that as *such,* they had full power to levy war, conclude peace, &c. I consider this as a declaration, not that the United Colonies *jointly,* in a *collective* capacity, were independent states, &c. but that *each* of them was a sovereign and independent state, that is, that *each* of them had a right to govern itself by its own authority, and its own laws, without any controul from any other power upon earth.

Before these solemn acts of separation from the Crown of *Great Britain,* the war between *Great Britain* and the United Colonies, *jointly,* and *separately,* was *a civil* war; but *instantly,* on that great and ever memorable event, the war changed its *nature,* and became a PUBLIC war between *independent governments;* and immediately thereupon ALL the *rights* of *public* war (and all the other rights of an independent nation) attached to the government of *Virginia;* and all the

former political connexion between *Great Britain* and *Virginia,* and also between their respective subjects, were totally dissolved; and not only the *two nations,* but all the subjects of each, were in a state of war; precisely as in the present war between *Great Britain* and *France.* *Vatt. lib.* 3. *c.* 18. § 292. 295. *lib.* 3. *c.* 5. § 70. 72. 73.

From the 4th of *July,* 1776, the *American* States were *de facto,* as well as *de jure,* in the possession and actual exercise of *all* the *rights* of independent governments. On the 6th of *February,* 1778, the King of France entered into a treaty of *alliance* with the *United States;* and on the 8th of *Oct.* 1782, a treaty of Amity and Commerce was concluded between the *United States* *225 and the States General of the *United Provinces.* I have ever * considered it as the established doctrine of the *United States,* that their independence originated from, and commenced with, the declaration of Congress, on the 4th of *July,* 1776; and that *no other period* can be fixed on for its commencement; and that all laws made by the legislatures of the several states, *after* the declaration of independence, were the laws of sovereign and independent governments.

That *Virginia* was part of the dismembered *British* empire, can, in my judgment, make no difference in the case. No such distinction is taken by *Vattel* (or any other writer) but *Vattel,* when considering the *rights of war* between *two parties* absolutely independent, and no longer acknowledging a common superior (precisely the case in question) thus expresses himself, *lib.* 3. *c.* 18. § 295. "In such case, the state is dissolved, and the war between the *two parties,* in *every respect,* is the same with that of a *public war* between *two different nations.*" And *Vattel* denies, that *subjects* can acquire *property* in things taken during a CIVIL war.

That the *creditor* and *debtor* were members of the same *empire, when the debt was contracted,* cannot (in my opinion) distinguish the case, for the *same* reasons. A most arbitrary claim was made by the parliament of *Great Britain,* to make laws to bind the people of *America,* in *all cases whatsoever,* and the king of *Great Britain,* with the approbation of parliament, employed not only the national forces, but hired foreign mercenaries to compel submission to this absurd claim of *omnipotent* power. The resistance against this claim was *just,* and independence became necessary; and the people of the *United States* announced to the people of *Great Britain,* "that they would hold them, as the rest of mankind, *enemies in war,* in *peace, friends.*" On the declaration of independence, it was in the option of any subject of *Great Britain,* to join their brethren in *America,* or to remain subjects of *Great Britain.* Those who joined us were entitled to all the benefits of our freedom and independence; but those who elected to continue subjects of *Great Britain,* exposed themselves to any loss, that might arise therefrom. By their adhering to the enemies of the *United States,* they *voluntarily* became parties to the injustice and oppression of the *British* government; and they also contributed to carry on the war, and to enslave their former fellow citizens. As members of the *British* government, from their own choice, they became *personally* answerable for the conduct of that government, of which they remained a part; and their property; wherever found (on land or water) became liable to confiscation. On this ground, Congress on the 24th of *July,* 1776, confiscated *any British* property taken on the *seas.* See 2 *Ruth.*

*226 *Inst. lib. 2. c. 9. § 13. p. 531. 559. Vatt. * lib. 2. c. 7. § 81. & c. 18. § 344. lib. 3. c. 5. § 74. & c. 9. § 161. & 193.*

The *British* creditor, by the conduct of his sovereign, became an *enemy* to the commonwealth of *Virginia;* and thereby his debt was forfeitable to that government, as a compensation for the damages of an *unjust* war.

It appears to me, that every nation at *war* with another is justifiable, *by the general and strict law of nations,* to seize and confiscate all *movable* property of its enemy, (of any kind or nature whatsoever) *wherever found,* whether within its territory, or not. *Bynkershoek Q. I. P. de rebus bellicis.* lib. 1. c. 7. p. 175. thus delivers his opinion: *"Cum ea sit belli conditio ut hostes sint, omni jure, spoliati proscriptique, rationis est, quascunque res hostium, apud hostes inventas, Dominum mutare, et Fisco cedere."* "Since it is a condition of war, that enemies, by *every right,* may be plundered and seized upon, it is reasonable that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated or *go into the treasury."* S. P. *Lee on Capt. c. 8, p.* 111. 2 *Burl. p.* 209. § 12 *p.* 219. § 2 *p.* 221. § 11. *Bynkershoek* the same book, and chapter, *page* 177. thus expresses himself: *"Quod dixi de actionibus recte publicandis ita demum obtinet. Si quod subditi nostri hostibus nostris debent, princeps a subditis suis, revera exegerit: Si exegerit recte solutum est, si non exegerit, pace facta, reviviscit jus pristinum creditoris; quia occupatio, quæ bello sit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quadammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc inter gentes fere convenit ut nominibus bello publicatis, pace deinde facta, exacta censeantur periisse, et maneant extincta; non autem exacta reviviscant, et restituantur veris creditoribus."*

"What I have said of *things in action being rightfully* confiscated, holds thus: "If the prince truly *exacts* from his subjects, what they owed to the enemy; if he "shall have exacted it, it is *rightfully* paid, if he shall not have exacted it, peace "being made, the *former* right of the creditor *revives;* because the seizure, which "is made during war, consists more in *fact* than in right. Debts, therefore, not "exacted, seem as it were to be forgotten in time of war, but upon peace, *by a "kind of postliminy,* return to their former proprietor. Accordingly, it is for the "most part agreed among nations, *that things in action,* being confiscated in war, "the peace being made, those which were *paid* are deemed to have *perished,* and "remain *extinct;* but those *not paid* revive, and are restored to their true creditors."

"Vatt. lib. 4. § 22. S. P. Lee on Capt. c. 8. p. 118."

*227 * That this is the law of nations, as held in *Great Britain,* appears from Sir *Thomas Parker's Rep. p. 267* (11 *William 3d*) in which it was determined, that *choses in action* belonging to an *alien enemy* are *forfeitable* to the crown of *Great Britain;* but there must be a commission and inquisition to entitle the crown; and if peace is concluded, *before* inquisition taken, *it discharges the cause of forfeiture.*

The *right* to confiscate the property of enemies, during war, is derived from a *state of war,* and is called the *rights of war.* This right originates from *self-preservation,* and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. *Justice,* also, is another pillar on which it may rest; to wit, a right to reimburse the expense of an *unjust* war. *Vatt. lib. 3. c. 8. § 138. & c. 9. § 161.*

But it is said, if *Virginia* had a right to confiscate *British property,* yet by the *modern* law, and practice of *European* nations, she was not justified in confiscating *debts* due from her citizens to subjects of *Great Britain;* that is, private debts. *Vattel* is the only author relied on (or that can be found) to maintain the distinction between confiscating *private* debts, and *other property* of an enemy. He admits the *right* to confiscate *such debts,* if the term of payment happen in the time of war; but this limitation on the right is nowhere else to be found. His opinion alone will not be sufficient to restrict the right to that case only. It does not appear in the present case, whether the time of payment happened before, or during the war. If this restriction is just, the Plaintiff ought to have shewn the fact. *Vattel* adds, "at present, in regard to the advantages and safety of *commerce, all* the sovereigns of Europe have departed from *this rigour;* and this *custom* has been *generally* received, and he who should act contrary to it (the custom) would injure the public faith." From these expressions it may be fairly inferred, that, by the rigour of the law of nations, *private debts* to enemies might be confiscated, as well as any other of their property; but that a *general custom* had prevailed in Europe to the contrary; founded on *commercial* reasons. The law of nations may be considered of three kinds, to wit, *general, conventional,* or *customary.* The *first* is *universal,* or established by the general consent of mankind, and binds *all nations.* The *second* is founded on *express* consent and is not universal, and only binds those nations that have assented to it: The *third* is founded on TACIT consent; and is only obligatory on those nations, who have adopted it. The relaxation or departure from the *strict rights of war* to confiscate private debts, by the *commercial* nations of Europe, was not binding on the state of *Virginia,* because founded *on custom only;* and she was at
*228 liberty to reject, or adopt the *custom,* as she pleased. * The conduct of nations at war is generally governed and limited by their exigencies and necessities. *Great Britain* could not claim from the *United States,* or any of them, any relaxation of the *general* law of nations, *during the late war,* because she did not consider it, as a *civil* war, and much less as a *public* war, but she gave it the odious name of *rebellion;* and she refused to the citizens of the *United States* the *strict rights of ordinary* war.

It cannot be forgotten, that the Parliament of *Great Britain,* by statute (16 *Geo.* 3. *c.* 5. *in* 1776) declared, that the vessels and cargoes belonging to the people of *Virginia,* and the twelve other colonies, found and taken on the high seas, should be liable to seizure and confiscation, as the property of open enemies; and, that the mariners and crews should be taken and considered as having *voluntarily* entered into the service of the King of *Great Britain;* and that the killing and destroying the persons and property of the *Americans, before* the passing this act, was *just and lawful:* and it is well known that, in consequence of this statute, very considerable property of the citizens of *Virginia* was seized on the high seas, and confiscated; and that other considerable property, found within that Commonwealth, was seized and applied to the use of the *British* army or navy. *Vattel lib.* 3. *c.* 12. *sec.* 191. says, and reason confirms his opinion, "That whatever is lawful for one nation to do, in time of war, is lawful for the other." The law of nations is part of the municipal law of *Great Britain,* and by her laws all *movable* property of enemies, found within the kingdom, is considered as forfeited to the crown, as the head of the nation; but if no inquisition is taken to ascertain the owners to be *alien enemies, before peace* takes place, the cause

of forfeiture is discharged by the peace *ipso facto*. *Sir Thomas Parker's Rep., pa.* 267. This doctrine agrees with *Bynk. lib.* 1. *c.* 7. *pa.* 177. and *Lee on Capt. ch.* 8. *p.* 118. that *debts* not confiscated and *paid,* revive on peace. *Lee* says, "debts, therefore, which are not *taken hold of,* seem, as it were, suspended and forgotten in time of war; but by a peace return to their former proprietor by a *kind of postliminy.*" Mr. *Lee,* who wrote since *Vattel,* differs from him in opinion, that *private debts* are not confiscable, *pag.* 114. He thus delivers himself: "By the law of nations, *Rights and Credits* are not less in our power than *other goods;* why, therefore, should we *regard the rights of war* in regard to *one,* and not as to the *other?* And when nothing occurs which gives room for a proper distinction, the *general* law of nations ought to prevail." He gives many examples of *confiscating debts,* and concludes, (p. 119) "All which prove, that not only *actions,* but
*229 all * other things, whatsoever, are forfeited in time of war and are often exacted."

Great Britain does not consider herself bound to depart from the rigor of the *general* law of nations, because the *commercial* powers of Europe wish to adopt a more *liberal* practice. It may be recollected, that it is an established principle of the law of nations, "that the goods of a *friend* are free in an *enemy's* vessel; and an *enemy's* goods lawful prize in the vessel of a *friend.*" This may be called the *general law* of nations. In 1780 the Empress of Russia proposed a relaxation of this rigor of the laws of nations, "That all the effects belonging to the subjects of the *belligerent powers* shall be free on board *neutral* vessels, except only *contraband* articles." This proposal was acceded to by the *neutral* powers of *Sweden, Denmark,* the *States General of the United Provinces, Prussia* and *Portugal; France* and *Spain,* two of the powers at war, did not *oppose* the principle, and *Great Britain* only declined to adopt it, and she still adheres to the *rigorous* principle of the law of nations. Can this conduct of *Great Britain* be objected to her, as an *uncivilized and barbarous practice?* The confiscating *private debts* by *Virginia* has been branded with those terms of reproach, and very improperly, in my opinion.

It is admitted, that *Virginia* could not confiscate *private debts* without a violation of the *modern* law of nations, yet if in *fact,* she has so done, the law is obligatory on all the citizens of *Virginia,* and on her Courts of Justice; and, in my opinion, on all the Courts of the *United States.* If *Virginia* by such conduct violated the law of nations, she was answerable to *Great Britain,* and such *injury could only be redressed in the treaty of peace.* Before the establishment of the national government, *British* debts could only be sued for in the *state* court. This, alone, proves that the several states possessed a power over debts. If the crown of *Great Britain* had, according to the *mode* of proceeding in that country, confiscated, or forfeited *American debts,* would it have been permitted in any of the courts of *Westminster Hall,* to have denied the *right* of the crown, and that its power was restrained by the *modern* law of nations? Would it not have been answered that the *British* nation was to justify her own conduct; but that her courts were to obey her laws.

It appears to me, that there is another and conclusive ground, which effectually precluded any objection, *since the peace,* on the part of *Great Britain, as a nation,* or on the part of any of *her subjects,* against the *right* of *Virginia* to confiscate *British debts,* or any other *British* property, during the war; even on

the admission that such confiscation was in violation of the ancient or *modern* law of nations.

*230 * If the Legislature of *Virginia confiscated* or *extinguished* the debt in question, by the law of the 20th of *October* 1777, as the Defendants in error contend, this *confiscation* or *extinguishment,* took place in 1777, *flagrante Bello;* and the definitive treaty of peace was ratified in 1783. What effects flow from a treaty of peace, even if the *confiscation,* or *extinguishment* of the debt was contrary to the law of nations, *and* the stipulation in the fourth article of the treaty does *not* provide for the recovery of the debt in question?

I apprehend that the treaty of peace abolishes the *subject* of the war, and that after peace is concluded, neither the matter in dispute, nor the *conduct* of either party, during the war, can ever be revived, or brought into contest again. All violences, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and *all those things* are *implied* by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, *British* property confiscated, or extinguished, during the war, by any of the *United States,* could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated *after the treaty,* by the *British* government, much less by her subjects in courts of justice. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the *treaty of peace,* it is thereby *so far* considered *lawful,* as never afterwards to be revived, or to be a subject of complaint.

Vattel lib. 4. *sect.* 21. *p.* 121. says, "The state of things at the *instant* of the treaty, is held to be *legitimate,* and any change to be made in it requires an *express specification* in the treaty; consequently, all things not mentioned in the treaty, are to remain as they were at the conclusion of it.—All the *damages* caused during the war are likewise buried in oblivion; and no plea is allowable for those, the reparation of which is not mentioned in the treaty: *They are looked on as if they had never happened.*" The *same* principle applies to *injuries* done by one nation to another, on occasion of, and during the war. *See Grotius lib.* 3. *c.* 8. *sect.* 4.

The Baron *De Wolfuis,* 1222, says, *"De quibus nihil dictum ea manent quo sunt loco."* Things of which nothing is said, remain in the state in which they are.

It is the opinion of the celebrated and judicious Doctor *Rutherforth,* that a nation in a *just war* may seize upon any *movable* goods of an enemy, (and he makes no distinction as to *private* debts) but that whilst the war continues,

*231 the nation has, *of right,* nothing but the *custody* of the goods taken; and * if the nation has granted to *private* captors (as privateers) the property of goods taken by them, and on peace, *restitution* is agreed on, that the *nation* is obliged to make restitution, and not the *private* captors; and if on peace no restitution is stipulated, that the *full property* of *movable* goods, taken from the enemy during the war, passes, by *tacit* consent, to the nation that takes them. This I collect as the *substance* of his opinion in *lib.* 2. *c.* 9, from *p.* 558 to 573.

I shall conclude my observations on the *rights* of *Virginia* to confiscate *any British* property, by remarking that the *validity* of such a law would not be questioned in the Court of Chancery of *Great Britain;* and I confess the doctrine seemed strange to me in an *American* Court of Justice. In the case of *Wright and Nutt,* Lord Chancellor *Thurlow* declared, that he considered an act of the State

of *Georgia,* passed in 1782, for the confiscation of the real and personal estate of *Sir James Wright,* and also his *debts,* as a law of an *independent country;* and concluded with the following observation, that the law of every country, must be equally regarded in the courts of justice of *Great Britain,* whether the law was a *barbarous or civilized* institution, or wise or foolish. *H. Black Rep. p.* 149. In the case of *Folliot* against *Ogden,* Lord *Loughborough,* Chief Justice of the Court of Common Pleas, in delivering the judgment of the court, declared "that the act of the State of *New York,* passed in 1779, for attainting, forfeiting, and confiscating the real and personal estate of *Folliott,* the Plaintiff, was certainly of as *full validity,* as the act of any independent State. *H. Black. Rep. p.* 135. On a writ of error, *Lord Kenyon,* Chief Justice of the Court of King's Bench, and Judge *Grose,* delivered direct contrary sentiments; but Judges *Ashurst* and *Buller* were silent. 3 *Term Rep. p.* 726.

From these observations, and the authority of *Bynkershoek, Lee, Burlamaque* and *Rutherforth,* I conclude, that *Virginia* had a *right,* as a sovereign and independent nation, to confiscate *any British* property *within its territory, unless* she had *before* delegated that power to Congress, which Mr. *Lewis* contended she had done. The proof of the allegation that *Virginia* had transferred this authority to Congress, lies on those who make it; because if she had parted with such power it must be conceded, that she once *rightfully* possessed it.

It has been inquired what powers Congress possessed from the *first* meeting, in *September* 1774, until the ratification of the articles of confederation, on the 1st of *March,* 1781, It appears to me, that the powers of Congress, *during that whole period,* were derived from *the people* they represented, expressly given, through the medium of their State Conventions, or State Legislatures; *or* *232 that after they were exercised they were * impliedly ratified by the acquiescence and obedience of the people. After the confederacy was compleated, the powers of Congress rested on the authority of the *State Legislatures,* and the *implied ratifications of the people;* and was a *government* over *governments.* The powers of Congress originated from necessity, and arose out of, and were only limited by, events or, in other words, they were *revolutionary* in their very nature. Their extent depended on the exigencies and necessities of public affairs. It was absolutely and indispensably necessary that Congress should possess the power of *conducting* the war against *Great Britain,* and therefore, if not expressly given by all, (as it was by some of the States) I do not hesitate to say, that Congress did rightfully possess *such* power. The authority to make *war,* of necessity implies the power to make *peace;* or the war must be perpetual. I entertain this general idea, that the several States retained all *internal sovereignty;* and that Congress properly possessed the great *rights of external sovereignty:* Among other, the right to make treaties of commerce and alliance, as with *France* on the 6th of *February* 1778. In deciding on the powers of Congress, and of the several States, BEFORE the confederation, I see but one safe rule, namely, that all the powers ACTUALLY exercised by Congress, *before* that period, were *rightfully* exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an *express,* or *implied grant;* and that all the powers exercised by the State Conventions or State Legislatures were also *rightfully* exercised, on the *same presumption* of authority from the people. That Congress did not possess *all* the powers of *war* is self-evident, from this considera-

tion alone, that she never attempted to lay any kind of *tax* on the people of the *United States,* but relied altogether on the State Legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all the paper money issued by Congress. It was expressly provided, in the 8th article of the confederation, that "all *charges of war* (and all other expenses for the common defence and general welfare) and allowed by Congress, shall be defrayed out of a common treasury, *to be supplied by the several States* in proportion to the value of the land in each State; and *the taxes for paying the said proportion, shall be levied by the Legislatures of the several States.*" In every free country the power of laying taxes is considered a *legislative* power over the *property* and *persons* of the citizens; and this power the people of the *United States,* granted to their State Legislatures, and they neither could, nor did transfer it to Congress; but on the contrary they expressly stipulated that it should remain with them.

It is an incontrovertible *fact* that Congress never attempted to confiscate
*233 * any kind of *British* property within the *United States* (except what their Army, or vessels of war captured) and thence I conclude that Congress did not conceive the power was vested in them. Some of the states did exercise this power, and thence I infer, they possessed it.--On the 23d of *March,* 3d of *April,* and 24th of *July,* 1776, Congress confiscated *British* property, taken on the high *seas.* . . . .

Chisholm, executor, v. State of Georgia.

Supreme Court of the United States, 1793.

[2 *Dallas,* 419.][1]

Stephen V. R. Ableman, Plaintiff in Error, v. Sherman M. Booth; and The United States, Plaintiff in Error, v. Sherman M. Booth

Supreme Court of the United States, 1858.

[21 *Howard,* 506.]

1. The process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power.
2. A *habeas corpus,* issued by a State judge or court, has no authority within the limits of the sovereignty assigned by the Constitution to the United States. The sovereignty of the United States and of a State are distinct and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits.
3. When a writ of *habeas corpus* is served on a marshal or other person having a prisoner in custody under the authority of the United States, it is his duty, by a proper return, to make known to the State judge or court the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the State authority, but to obey and execute the process of the United States.
4. This court has appellate power in all cases arising under the Constitution and laws of the United States, with such exceptions and regulations as Congress may make, whether the cases arise in a State court or an inferior court of the United States. And, under the act of Congress of 1789, when the decision of the State court is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the State court before this court for re-examination and revision.
5. The act of Congress of September 18, 1850, usually called the fugitive slave law, is constitutional in all its provisions.
6. The commissioner appointed by the District Court of the United States for the district of Wisconsin had authority to issue his warrant and commit the defendant in error for an offence against the act of September 18, 1850.

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[1] For the text of this important case see *post,* pp. 434-481, where it is printed in full. The reader's attention is particularly called to the opinions of Justices Iredell and Wilson and of Chief Justice Jay, in which the nature of the more perfect Union and the relations of the Government thereof and of the States are discussed from various points of view.—Editor.

7. The District Court of the United States had exclusive jurisdiction to try and punish the offence; and the validity of its proceedings and judgment cannot be re-examined and set aside by any other tribunal.

*507 THESE two cases were brought up from the Supreme Court * of the State of Wisconsin by a writ of error issued under the 25th section of the judiciary act.

The facts are stated in the opinion of the court. . . .

In 1854 one Booth was arrested in Milwaukee under a warrant of the U. S. District Court for Wisconsin, on the ground that he had aided and abetted the escape of a fugitive slave held in the custody of the United States deputy marshal under the act of Congress of September 18, 1850, commonly known as the Fugitive Slave Law. Upon hearing before a Commissioner of the District Court, he was committed to the custody of one Ableman, United States marshal of the District, to await trial for this offense. Booth applied for a writ of *habeas corpus* to a justice of the Supreme Court of Wisconsin, stating that he was unlawfully deprived of his liberty, in that the act of Congress of September 18, 1850, was unconstitutional and void. The writ was allowed, and, upon hearing, the marshal was directed to release Booth, which was done. Afterward, the Supreme Court of Wisconsin affirmed the act of its justice.

After Booth had thus been set at liberty, the grand jury of the United States District Court indicted Booth for the offense with which he was charged before the Commissioner. He was tried, found guilty, sentenced to a month's imprisonment, to pay a fine of $1,000 and to remain in prison until the sentence was complied with. Thereupon, Booth petitioned the Supreme Court of Wisconsin for writs of *habeas corpus* against Ableman, the marshal of the District Court, and the sheriff of Milwaukee, into whose custody the marshal had delivered Booth. Upon the hearing, the Supreme Court of Wisconsin decided that Booth's imprisonment was illegal and directed that he be discharged. He was accordingly set at liberty.

The Supreme Court of Wisconsin thus claimed and exercised the right to declare a law of the United States unconstitutional and void and to discharge from custody of the United States a person accused, in one case, and convicted, in the other, of violating this act. Upon a writ of error from the Supreme Court of the United States to the Supreme Court of Wisconsin, with which the latter refused to comply, the following judgment was rendered.[1]

Mr. Chief Justice TANEY delivered the opinion of the court. . . .

*513 * It will be seen, from the foregoing statement of facts, that a judge of the Supreme Court of the State of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the State court has gone a step further, and claimed and

[1] The above is a much shortened statement of the facts of these cases contained in the omitted portion of the opinion of the court.—Editor.

exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by
*514 *habeas corpus,* * has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus.* But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus,* were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to
*515 offences against the act of Congress in * question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a

sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.

The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had at-
*516 tempted to do so; for no State can authorize one of its judges * or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.

It is, however, due to the State to say, that we do not find this claim of paramount jurisdiction in the State courts over the courts of the United States asserted or countenanced by the Constitution or laws of the State. We find it only in the decisions of the judges of the Supreme Court. Indeed, at the very time these decisions were made, there was a statute of the State which declares that a person brought up on a *habeas corpus* shall be remanded, if it appears that he is confined:

"1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

"2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction." (Revised Statutes of the State of Wisconsin, 1849, ch. 124, page 629.)

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the Supreme Court claims to have derived from the State.

*517 But, as we have already said, questions of this kind must * always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Con-

stitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the
*518 local tribunals could hardly be expected to be always free * from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the General Government, in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United

States. And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same
*519 in every State; and to guard against evils which would * inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this Constitution, and the laws of the United States *which shall be made in pursuance thereof,* shall be the supreme law of the land, and obligatory upon the judges in every State." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and
*520 of the States, which must be settled by force of arms, unless some * tribunal was created to decide between them finally and without appeal.

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to

declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our
*521 Government, State and National, would soon cease to be Governments * of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the General Government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon Congress. That power is specifically given in article 1, section 8, paragraph 18, in the following words:

"To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Under this clause of the Constitution, it became the duty of Congress
*522 to pass such laws as were necessary and proper to * carry into execution the powers vested in the judicial department. And in the performance of this duty, the First Congress, at its first session, passed the act of 1789, ch. 20, entitled *"An act to establish the judicial courts of the United States."* It will be remembered that many of the members of the Convention were also members of this Congress, and it cannot be supposed that they did not understand the mean-

ing and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the Government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the 25th section of the act of 1789, Congress authorized writs of error to be issued from this court to a State court, whenever a right had been claimed under the Constitution or laws of the United States, and the decision of the State court was against it. And to make this appellate power effectual, and altogether independent of the action of State tribunals, this act further provides, that upon writs of error to a State court, instead of remanding the cause for a final decision in the State court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the First Congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by States or State tribunals.

In the case before the Supreme Court of Wisconsin, a right was claimed under the Constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled
*523 the provisions of the Constitution itself * and the act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus,* to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus,* and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus,* nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford

him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and
*524 to refuse obedience to the mandate or * process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States, (as well as those of the General Government,) shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and
*525 with these powers, that the Constitution * was submitted to the people of the several States, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this Constitution.* And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for

that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceed-
*526 ing, it was for the * tribunals of the United States to revise and correct it, and not for a State court. And as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by *habeas corpus* or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the District Court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the Supreme Court of Wisconsin must therefore be reversed in each of the cases now before the court.[1]

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[1] In *Kohl, et al.*, v. *United States* (91 U. S. 367, 372), decided in 1875, Mr. Justice Strong, speaking for the court, said, in referring to the United States:

"That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman* v. *Booth,* 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being."—Editor.

State of Texas v. White, et al.

Supreme Court of the United States, 1868.

[7 *Wallace*, 700.]

1. The word State describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country, or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.
2. In the Constitution the term State most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.
3. But the term is also used to express the idea of a people or political community, as distinguished from the government. In this sense it is used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.
4. The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction, from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And, when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union."
5. But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. On the contrary, it may be not unreasonably said, that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.
6. When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.
7. Considered as transactions under the Constitution, the ordinance of secession, adopted by the convention, and ratified by a majority of the citizens of Texas, and all the acts of
*701 her legislature intended to give * effect to that ordinance, were absolutely null. They were utterly without operation in law. The State did not cease to be a State, nor her citizens to be citizens of the Union.
8. But in order to the exercise, by a State, of the right to sue in this Court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.
9. While Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, no suit, instituted in her name, could be maintained in this court. It was necessary that the government and the people of the State should be restored to peaceful relations to the United States, under the Constitution, before such a suit could be prosecuted. . . .

*717 * The CHIEF JUSTICE [Chase] delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State. . . .

*718 * The first inquiries to which our attention was directed by
*719 * counsel, arose upon the allegations . . . (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. . . .

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

*720 * We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican in-

stitutions of our own country are established. It was stated very clearly by an eminent judge,[1] in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

*721 * In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said.

*722 * The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February,[2] a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance

[1] Mr. Justice Paterson, in *Penhallow* v. *Doane's Admrs.*, 3 Dallas, 93.

[2] Paschal's Digest Laws of Texas, 78.

to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be "a separate and sovereign State," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof."

It was ordered by a vote of the convention[1] and by an act of the legislature,[2] that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, "in order," as the resolution declared, "that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention."

*723 Before the passage of this resolution the convention had * appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the National troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State.[3] Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was organized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners.[4]

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words "United States," were stricken out wherever they occurred, and the words "Confederate States" substituted; and the members of the legislature, and all officers of the State, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy. . . .

*724 * The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States per-

[1] Paschal's Digest Laws of Texas, 80.

[2] Laws of Texas, 1859–61, p. 11. [3] Paschal's Digest, 80.

[4] Texas Reports of the Committee (Library of Congress), 45.

mitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

*725 The Union of the States never was a purely artificial and * arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States."[1] Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

*726 * When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpteual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between

[1] *County of Lane* v. *The State of Oregon*, 7 Wallace, 76.

the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State
*727 in its relations with the National * government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guaranteee to every State in the Union a republican form of government.
*728 * The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty[1] by President Lincoln, in December, 1863, and by President Johnson in May, 1865.[2] And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States.[3]

The new freemen necessarily became part of the people, and the people still constituted the States; for States, like individuals, retain their iden-
*729 tity, though changed to some * extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary

[1] 13 Stat. at Large, 737. [2] *Ib.*, 758.
[3] 13 Stat. at Large, 774-5.

and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the
*730 Constitution, it is not now necessary to determine. * The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island,[1] arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Recon-
*731 struction * Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to

[1] *Luther* v. *Borden*, 7 How. 42.

their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But, it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867,[1] the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the act necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed
*732 by the commander of the district. Each of the * three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

*736 * On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

*737 * Mr. Justice GRIER, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

The first question in order is the jursdiction of the court to entertain this bill in behalf of the State of Texas.

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[1] 14 Stat. at Large, 428.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as *a political fact,* not as a *legal fiction.* This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass* v. *Ellzey.* As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. . . .[1]

*738 * Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dacotah is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

*739 * Now, by assuming or admitting *as a fact* the present *status* of Texas as a State not in the Union *politically,* I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically,* Texas is not *a State in this Union.* Whether rightfully out of it or not is a question not before the court. . . .[2]

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[1] The learned Justice here quotes in full the opinion of Mr. Chief Justice Marshall in *Hepburn and Dundas* v. *Ellzey* (2 Cranch, 452), *post,* pp. 46, 50.—Editor.

[2] The balance of Mr. Justice Grier's opinion, dealing with the repudiation of contracts, is omitted.—Editor.

*741 * Mr. Justice SWAYNE:

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

THE DECREE.

The decree overruled the objection interposed by way of plea, in the
*742 answer of defendants to the authority of the solicitors of * the complainant to institute this suit, and to the right of Texas as one of the States of the National Union, to bring a bill in this court. . . .

*743 * Both the complainant and the defendants had liberty to apply for further directions in respect to the execution of the decree.

United States v. Cruikshank.

Supreme Court of the United States, 1875.

[92 *United States,* 542.]

1. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.
2. There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other.
3. The government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.
4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution. The first amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the national government alone. It left the authority of the States unimpaired, added nothing to

the already existing powers of the United States, and guaranteed the continuance of the right only against Congressional interference. The people, for their protection in the enjoyment of it, must, therefore, look to the States, where the power for that purpose was originally placed.

5. The right of the people peaceably to assemble, for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.

6. The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than it shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government.

7. Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.

8. The fourteenth amendment prohibits a State from depriving any person of life,
*543 liberty, or property, without due process of law, and from denying to * any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

9. In *Minor* v. *Happersett,* 21 Wall. 178, this court decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al., supra,* p. 214, it held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

10. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States, of African descent, therein named; and which in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the constitution and laws of the United States; to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; deprive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several rights to the full and equal benefit of the law; prevent and hinder them in the free exercise and enjoyment of their several and respective right to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law by the people of said State,—do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of

that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged offence is not indictable under any act of Congress.

11. The counts of an indictment which, in general language, charges the defendants with an intent to hinder and prevent citizens of the United States, of African descent, therein named, in the free exercise and enjoyment of the rights, privilges, immunities, and
*544 protection, granted and secured to them * respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law.

12. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species,—it must descend to particulars. The object of the indictment is,—first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

13. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should, therefore, state the particulars, to inform the court as well as the accused. It must appear from the indictment that the acts charged will, if proved, support a conviction for the offence alleged.

Error to the Circuit Court of the United States for the District of Louisiana. . . .

*548 * Mr. Chief Justice Waite delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:—

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent

to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

*549 The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or * more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases,* 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate gov-

ernments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tran-
*550 quillity, provide for * the common defence, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citi-
*551 zenship * which owes allegiance to two sovereignties, and claims protection from both. The citizen can not complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that can not be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether

the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons* v. *Ogden,* 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling *552 in *Gibbons* v. *Ogden,* id. 203, subject to State * jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. *Barron* v. *The City of Baltimore,* 7 Pet. 250; *Lessee of Livingston* v. *Moore,* id. 551; *Fox* v. *Ohio,* 5 How. 434; *Smith* v. *Maryland,* 18 id. 76; *Withers* v. *Buckley,* 20 id. 90; *Pervear* v. *The Commonwealth,* 5 Wall. 479; *Twitchell* v. *The Commonwealth,* 7 id. 321; *Edwards* v. *Elliott,* 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell* v. *The Commonwealth,* 7 Wall. 325, "scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had

*553 been alleged in * these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York* v. *Miln,* 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States.

*554 It is no more the duty or within the power of the United States to punish for a conspiracy * to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia* v. *Okely,* 4 Wheat. 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several rights and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said

State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just con-
*555 sidered, add any thing * to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." In *Minor* v. *Happersett,* 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States* v. *Reese et al., supra,* p. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exer-
*556 cise of that right on * account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.

*557 We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, * and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. . . .

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. . . .

These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

*558 In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be * informed of the nature and cause of the accusation." Amend. VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States* v. *Cook*, 17 Wall.

174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." . . .

*559 * But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

Mr. Justice Clifford dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court. . . .

Hepburn & Dundas v. Ellzey.[1]

Supreme Court of the United States, 1805.

[2 *Cranch,* 445.]

A citizen of the district of Columbia cannot maintain an action against a citizen of Virginia, in the circuit court for the Virginia district. A citizen of the district of Columbia is not a citizen of a *state,* within the meeting [meaning] of the constitution.

THIS was a question *certified* from the circuit court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed. (*Laws of U. S. vol.* 6, p. 89. *sec.* 6.)

The certificate sets forth that "in this cause it occurred as a question whether "*Hepburn* and *Dundas,* the plaintiffs in this cause, who are citizens and residents "of the District of Columbia, and are so stated in the pleadings, can maintain an "action in this court against the defendant who is a citizen and inhabitant of the "commonwealth of Virginia, and is also stated so to be in the pleadings, or whether "for want of jurisdiction the said suit ought not to be dismissed."

E. J. Lee, for plaintiffs. This question arises under the 2d section of the 3d article of the constitution of the United States, which defines the jurisdiction of the courts of the United States.

The particular words of the section which apply to the question are those declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different states."

If such words are used in the constitution as according to their literal meaning, will give jurisdiction to the court, it is all that is necessary to be established.

It is essential, in determining this question, to ascertain the import of the term "states," which in itself is a vague expression. It will sometimes mean an extent of country within certain limits, within which the authority of the neighboring country cannot be lawfully exercised. It sometimes means the government which is established in separate parts of a territory occupied by a political society. It may also be said to be a society by which a multitude of people
*446 unite together under * the dependence of a superior power for protection. 2 *Burlemaqui,* 21.—And sometimes it means a multitude of people united by a communion of interest and by common laws. This is the definition given by Cicero.

Either of the above definitions will bring the district within the meaning of the constitution. It is certainly such an extent of country as excludes from within its limits the force and operation of the laws of the governments which adjoin it. There exists within it a political society with a government over it. That government for all general concerns of the society is the congress and president of the United States. And as to its local concerns, there are subordinate authorities acting under the superintendence of the national government. This political society is dependent upon the superior power of the United States.

It is not essential to the formation of a state that the members of it should have the power in all cases of electing their own officers; but it is sufficient that

[1] Present, *Marsha*ll, Ch. J.—*Cushing, Patterson, Chase* and *Washington,* Justices.

there are certain rules laid down either by themselves, or those by whom they have submitted to be governed, for their conduct.

The people of the district are governed by a power to which they have freely submitted. They do not possess in as great degree the rights of sovereignty, as those people who inhabit the states. And if the free exercise of all the rights of sovereignty, uncontrouled by any other power, is essential in the formation of a state, none of those sections of the country which form the United States are entitled strictly to the appellation of a "state;" for there are certain rights of sovereignty which they cannot exercise in their state capacity, such as regulating commerce, making peace and war, &c.

The term "states," as used in the constitution may, according to the subject matter, be understood in either of the above senses. It has been understood by a majority of the judges of this court, in the case of *Chisholm's Executors* v. *The State of Georgia, 2 Dall.* 457, to mean the *government.*

*447 * The idea that those territories which are under the exclusive government of the United States are to be considered in some respects as included in the terms "states" as used in the constitution, is supported by the acts of congress.

In the 2d paragraph of the 2d section of the 4th art. of the constitution, it is declared, that "a person charged in any *state* with treason, felony, or other crime. "who shall flee from justice and be found in another *state, shall,* on demand of "the executive authority of *the state* from which he fled, be delivered up to be "removed to the *state* having jurisdiction of the crime." It is also declared in the same article of the constitution, that "no person held to service or labour in "*one state* under the laws thereof, escaping into *another,* shall, in consequence of "any law or regulation therein, be discharged from such service or labour, but "shall be delivered up on claim of the party to whom such service or labour may "be due."

Congress, in prescribing the mode of executing the powers contained in these clauses of the constitution, passed a law dated *Feb.* 12, 1793, *ch. 7, sec.* 1, *vol.* 2, *p.* 165, which declares "that whenever the executive authority of any "state in the union, *or of either of the territories northwest or south of the "river Ohio,* shall demand any person as a fugitive from justice, of the executive "authority of any such state *or territory* to which such persons shall have fled," and shall produce such evidence of the fact as is prescribed by the act, the person so escaping shall be surrendered, &c.—A similar provision with respect to persons held to labour or service under the laws of the *states or territories,* is contained in the same act of congress.

If these territories are not, as to some purposes, included in the term *"states,"* used in the above clauses of the constitution, congress could not constitutionally pass a law making it the duty of the executive of a state to comply with such a requisition of the executive of one of those territories. If they are thus included why may they not also be included in that part of the constitution which uses the same terms *"states,"* in defining the jurisdic-

*448 tion * of the courts? The citizens of the territories are subject to the same evil, if they are obliged to resort to the state courts, which was intended to be remedied by that clause of the constitution which authorizes citizens of different states to resort to the federal courts. And if being within the same evil authorized congress to give a latitude to the terms "states," in one part of the constitution, the same reason will authorize the same construction of the same term in another part.

The words of the constitution only authorizes such a requisition to be made by the executive of a *state,* upon the executive of another *state.* It must there-

fore be acknowledged either that the territories are included in the term *states*, or that the act of congress is unconstitutional. As a further proof of the same construction of the word *state*, congress, by the 6*th* section *of the act supplementary to the* act concerning the district of Columbia, have enacted that in all cases where the constitution or laws of the United States provide that criminals and fugitives from justice, or persons held to labour in any state, escaping into another state shall be delivered up, the chief justice of the said district shall be, and he is hereby required to cause to be apprehended and delivered up such criminal, &c. who shall be found within the district. Independent of these considerations, it seems to be agreeable to the first principles of government, that all persons who are under the peculiar and exclusive government and protection of a particular power, have, as it were, a natural claim upon that power for protection and redress of wrongs.—And that the courts of the United States are the most proper tribunals to which the people of the district of Columbia can apply for redress in all cases where the aggressor can be found within the jurisdiction of those courts. It seems to be a denial of that protection which the United State are bound to afford to those who reside under their exclusive jurisdiction, to say that because you may sue your debtor in a foreign tribunal (if I may use the expression) therefore you shall not resort to our own courts although your debtor may be found within our jurisdiction. The framers of the constitution could never have supposed it necessary to declare in express terms that the courts of the United States should have power to hear and decide on the complaints of one of the citizens of those districts that were under the exclu-
*449 sive government and care of the * United States, to whom alone allegiance was due. They could not have intended to deny to that part of the citizens of the United States who inhabit the territories, the privileges which were granted to citizens of particular states, and even to foreigners; especially the right of resorting to an impartial tribunal of justice. When they permitted aliens to resort either to the state or to the federal courts, they could not mean to confine one of their own exclusive citizens to a remedy in the state courts alone. It would be strange that those citizens who owe no allegiance but to the United States, should be debarred from going into the courts of the United States for redress, when that privilege is granted to others in like circumstances, who owe allegiance to a foreign, or to a state government.

C. Lee, contra. This is a new question, which has arisen in consequence of the cession of the district of Columbia, by the states of Virginia and Maryland to the United States.

The words of the constitution do not take in the case—and the act of congress is also too narrow.

The constitution is a limited grant of power. Nothing is to be presumed but what is expressed.

It is contended that a citizen of the district of Columbia is a citizen of a state. It is said that he is a citizen of the United States, and not being a citizen of the same state with the defendant he must be a citizen of a different state. But there may be a citizen of the United States who is not a citizen of any one of the states. The expression *a citizen of a state,* has a constitutional meaning. The states are not absolutely sovereigns, but (if I may use the expression) they are *demi-sovereigns.* The word state has a meaning peculiar to the United States.—It means a certain political society forming a constituent part of the union. There can be no state unless it be entitled to a representation in the Senate. It must have its separate executive, legislative and judicial powers. The term may also comprehend a number of other ideas.

Even if the constitution of the United States authorizes a more en-
*450 larged jurisdiction than the judiciary act of 1789 * has given, yet the court can take no jurisdiction which is not given by the act. I therefore call for the law which gives a jurisdiction in this case.

The jurisdiction given to the federal courts in cases between citizens of different states, was, at the time of the adoption of the constitution, supposed to be of very little importance to the people. *See the Debates in the Virginia Convention, p.* 109, 122, 128.

In no case from any one of the territories has this court ever considered itself as having jurisdiction; and in that of *Clark* v. *Bazadone* (*Ante, vol.* 1. *p.* 212) the writ of error was quashed because the act of congress had not given this court appellate jurisdiction in cases from the territories.

This is not a case between citizens of different states, within the meaning of the constitution. And in the case of *Bingham* v. *Cabot,* 3 *Dall.* 382, it was decided by this court that the courts of the United States were courts of limited jurisdiction, and that it must appear upon the record that the parties were citizens of different states in order to support the jurisdiction.

E. J. Lee, in reply. A law was not necessary to give the federal courts that jurisdiction which is provided for by the constitution. It was only necessary to limit the amount of the claims which should come before the different inferior courts.

If a demand should be made by the executive power of the district of Columbia, upon the executive of a state to deliver up a fugitive from justice, the constitution would apply, and oblige the state executive to respect the demand.

If the term *state* is to have the limited construction contended for by the opposite counsel, the citizens of Columbia will be deprived of the general rights of citizens of the United States.—They will be in a worse condition than aliens.

By the 4th article of the constitution of the United States, sec. 1, "Full
*451 "faith and credit shall be given, in * each state, to the public acts, records "and judicial proceedings of *every other state.*" If the district of Columbia is not to be considered as a state for this purpose, there is no obligation upon the states, to give faith or credit to the records or judicial proceedings of this district. But congress, in carrying into effect, this provision of the constitution, by the act of March 27th, 1804, (*vol.* 7, *p.* 152) has expressly declared that it "shall apply as well to the public acts," &c. "of the *respective territories of "the United States and countries subject to the jurisdiction of the United States,* "as to the public acts," &c. "of the several states," thereby giving another clear legislative construction to the word *states,* conformable to that for which we contend.

Again, by the 9th section of the 1st article of the constitution of the United States, "no tax or duty shall be laid on articles exported from any *state.*" Can congress lay a tax or duty on articles exported from the district of Columbia, without a violation of the constitution?

By the same sec. "no preference shall be given by any regulation of commerce "or revenue to the ports of one *state* over those of *another.*" Can congress constitutionally give a preference to the ports of the district of Columbia over those of any of the states?

The same section says, "Nor shall vessels bound to or from *one state* be "obliged to enter, clear, or pay duties in another." Can vessels sailing to or from the district of Columbia be obliged to enter, clear, or pay duties in Maryland or Virginia? Yet all this may be done if the rigid construction contended for be given to the word *state.*

It is true that the citizens of Columbia are not entitled to the elective franchise in as full a manner as the citizens of states. They have no vote in the choice of president, vice-president, senators and representatives in congress. But in this they are not singular. More than seven eighths of the free white inhabitants of Virginia are in the same situation. Of the white population of Virginia, one-half are females—half of the males probably are under age—and not more than one-half of the residue are freeholders and entitled to vote at elections. The same case happens in some degree in all the states. A great
*452 majority * are not entitled to vote. But in every other respect the citizens of Columbia are entitled to all the privileges and immunities of citizens of the United States.

Marshall, Ch. J., delivered the opinion of the court.

The question in this case is whether the plaintiffs, as residents of the district of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia.

This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case therefore it must appear that Columbia is a state.

On the part of the plaintiffs, it has been urged, that Columbia is a distinct political society; and is therefore "a state" according to the definitions of writers on general law.

This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative.

The senate of the United States shall be composed of two senators *from* each state.

Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word state is used in the constitution as
*453 designating a member of the union, and excludes * from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the constitution have been cited by the plaintiffs to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state

in the union, should be closed upon *them*.—But this is a subject for legislative not for judicial consideration.

The opinion to be certified to the circuit court is that that court has no jurisdiction in the case.[1]

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[1] In the case of a treaty with a foreign country, the District of Columbia is, for purposes of the international obligation, regarded as a State. In construing Article 7 of the treaty between the United States and France, concluded February 23, 1853, in *Geofrey* v. *Riggs* (133 U. S. 258, 268-272), decided in 1890, Mr. Justice Field, delivering the unanimous opinion of the court, said:

"This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union.' Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this court in the recent case of *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, 9, decided at the present term. . . .

"A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by 'States of the Union' is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. . . .

"We are, therefore, of opinion that this is the meaning of the article in question—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other, that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right, of disposition and inheritance of property, in France, is accorded to citizens of the United States, as are there enjoyed by its own citizens. . . ."—Editor.

Corporation of New Orleans v. Winter, et al.

Supreme Court of the United States, 1816.

[1 *Wheaton,* 91.]

A citizen of a territory cannot sue a citizen of a *state,* in the courts of the United States, nor can those courts take jurisdiction, by other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed.

Error from the district court for the district of Louisiana. The defendants in error commenced their suit in the said court, to recover the possession
*92 and property of certain lands in the city of New * Orleans; claiming title as the heirs of Elisha Winter, deceased, under an alleged grant from the Spanish government, in 1791; which lands, it was stated, were afterwards reclaimed by the Baron de Carondelet, governor of the province of Louisiana, for the use of fortifications. One of the parties, petitioners in the court below, was described in the record as a citizen of the state of Kentucky; and the other, as a citizen of the Mississippi territory. The petitioners recovered a judgment in the court below, from which a writ of error was brought. . . .

*94 * February 28th, 1816. Marshall, Ch. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The proceedings of the court, therefore, is arrested *in limine,* by a question respecting its jurisdiction. In the case of Hepburn & Dundas v. Ellzey, this court determined, on mature consideration, that a citizen of the district of Columbia could not maintain a suit in the circuit court of the United States. That opinion is still retained.

It has been attempted to distinguish a *Territory* from the district of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a territory.

*95 Gabriel Winter, then, * being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of Strawbridge *et al.* v. Curtis et al., it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The circuit court of Louisiana, therefore, had no jurisdiction of the

cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.[1]

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[1] In *National Bank* v. *County of Yankton* (101 U. S. 129, 132-133), decided in 1879, Mr. Chief Justice Waite, delivering the unanimous opinion of the Supreme Court, said:

"It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States. . . ."—Editor.

Coyle v. Smith, Secretary of State of the State of Oklahoma.

Supreme Court of the State of Oklahoma, 1911.

[221 *United States,* 559.]

The power to locate its own seat of government, to change the same, and to appropriate its public money therefor, are essentially state powers beyond the control of Congress.

The power given to Congress by Art. IV, § 3, of the Constitution is to admit new States to this Union, and relates only to such States as are equal to each other in power and dignity and competency to exert the residuum of sovereignty not delegated to the Federal Government.

The constitutional duty of Congress of guaranteeing to each State a republican form of government does not import a power to impose upon a new State, as a condition to its admission to the Union, restrictions which render it unequal to the other States, such as limitations upon its power to locate or change its seat of government.

No prior decision of this court sanctions the claim that Congress in admitting a new State can impose conditions in the enabling act, the acceptance whereof will deprive the State when admitted of any attribute of power essential to its equality with the other States.

Congress may embrace in an enabling act conditions relating to matters wholly within its sphere of powers, such as regulations of interstate commerce, intercourse with Indian tribes and disposition of public lands, but not conditions relating wholly to matters under state control such as the location and change of the seat of government of the State.

The Constitution not only looks to an indestructible union of indestructible States, *Texas* v. *White,* 7 Wall. 700, 725, but to a union of equal States as well.

The legislature of Oklahoma has power to locate its own seat of government, to change the same and to appropriate money therefor, notwithstanding any provisions to the contrary in the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, and the ordinance irrevocable of the convention of the people of Oklahoma accepting the same.

113 Pac. Rep. 944, affirmed.

*560 * THE facts, which involve the constitutionality of a legislative act of Oklahoma, providing for the removal of the capital of the State from Guthrie to Oklahoma City, are stated in the opinion. . . .

*562 * MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the State providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the State for the purpose of carrying out the act by the erection of the necessary state buildings. (Act of Oklahoma, December 29, 1910) not yet published.

*563 * The opinion of the Supreme Court of Oklahoma may be found in 113 Pac. Rep. 944.

By an act passed December 7, 1910, the State gave to its Supreme Court "original jurisdiction" to entertain any proceeding brought in that court by resident taxpayers of the State to have determined "the legality of the removal or location or attempt to remove or locate the state capital" and certain other

state institutions. This act was passed in advance of the removal act here involved, and for the express purpose of providing a speedy method for the determination of constitutional objections which might be urged against the proposed relocation of the seat of the state government. The Removal Act followed, and this proceeding was at once started in the Supreme Court of the State by the plaintiffs in error, who claimed not only to be citizens and taxpayers of the State, but also owners of large property interests in Guthrie, which would be adversely affected by the removal of the seat of government as proposed by the act in question. The validity of the law locating the capital at Oklahoma City was attacked for many reasons which involved only the interpretation and application of the constitution of the State. These were all decided adversely to the petitioners. We shall pass them by as matters of state law, not subject to the reviewing power of this court under a writ of error to a state court.

The question reviewable under this writ of error, if any there be, arises under the claim set up by the petitioners, and decided against them, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the State at Oklahoma City was void as repugnant to the Enabling Act of Congress of June 16, 1906, under which the State was admitted to the Union. 34 Stat. 267, c. 3335. The act referred to is entitled "An act to enable the people of Oklahoma and the Indian Territory to form a constitution
*564 and state * government and be admitted into the Union on an equal footing with the original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The second section is lengthy and deals with the organization of a constitutional convention and concludes in these words: "The capital of said State shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the legislature; provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during said period."

Other sections of the act require that the constitution of the proposed new State shall include many specific provisions concerning the framework of the government, and some which impose limitations upon the State as regards the Indians therein, and their reservations, in respect of traffic in liquor among the Indians or upon their reservations. The twenty-second and last section applicable to Oklahoma reads thus: "That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act."

The constitution as framed contains nothing as to the location of the State capital; but the convention which framed it adopted a separate ordinance in these words:

"SEC. 497. Enabling Act accepted by Ordinance Irrevocable. Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States, entitled 'An Act
*565 to Enable the People * of Oklahoma and the Indian Territory to form a

Constitution and State Government and be admitted into the Union on an equal footing with the original States; and to Enable the People of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,' approved June the sixteenth, Anno Domini, Nineteen Hundred and Six."

This was submitted along with the constitution as a separate matter and was ratified as was the constitution proper.

The efficacy of this ordinance as a law of the State conflicting with the removal act of 1910 was, of course, a state question. The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it *possesses,* it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional *566 power of admitting new States to this Union, and the constitutional * duty of guaranteeing to "every State in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original States."

The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or great, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States."

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms

or conditions were exacted from either. Each act declares that the State is admitted "as a new and *entire member* of the United States of America."
*567 1 Stat., * 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be "one of the United States of America," "on an equal footing with the original States in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original States."

The power is to admit "new States into *this* Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty
*568 of seeing that * such form is not changed to one anti-republican,—*Minor* v. *Happersett,* 21 Wall, 162, 174, 175,—but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may by the imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other States. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new State, little need to be said. The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a

new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.

The case of *Permoli* v. *First Municipality*, 3 How. 589, 609, is in point. By the act of February 20, 1811, the people of the Territory of Orleans were empowered to form a constitution and state government. The third
*569 * section of that act prescribed, among other things, that it should "contain the fundamental principles of civil and religious liberty." The act of 1812 admitting the State provided, "that all the conditions and terms contained in said third section should be considered, deemed and taken as fundamental conditions and terms, upon which the said State is incorporated into the Union." It was claimed that a certain municipal ordinance was in violation of religious liberty, and therefore void, as repugnant to the act under which the State had been admitted to the Union. Dealing with those terms of the enabling and admitting acts in respect to the contents of the constitution to be adopted by the people of the Territory seeking admission as a State, this court, speaking by Mr. Justice Catron, said:

"All Congress intended, was to declare in advance to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the state 'on an equal footing with the original States in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended."

*570 * The reference by Justice Catron to the terms and conditions in act of 1812, is to a provision in the act of February 20, 1811 (2 Stat. 641, 642), quite common in enabling acts, by which the new State disclaimed title to the public lands, and stipulated that such lands should remain subject to the sole disposition of the United States, and for their exemption from taxation, and that its navigable waters should forever remain open and free, etc. Such stipulations, as we shall see, being within the sphere of congressional power, can derive no force from the consent of the State. Like stipulations, as well as others in respect to the control by the United States of large Indian reservations and Indian population of the new State, are found in the Oklahoma enabling act. Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the State.

So far as this court has found occasion to advert to the effect of enabling

acts as affirmative legislation affecting the power of new States after admission, there is to be found no sanction for the contention that any State may be deprived of any of the power constitutionally possessed by other States, as States, by reason of the terms in which the acts admitting them to the Union have been framed.

The case of *Pollard's Lessee* v. *Hagan,* 3 How. 212, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the State of Alabama. The plaintiff claimed under a patent from the United States, and the defendant under a grant from the State. The plaintiff relied upon two propositions which are relevant to the question here. One was that in the act under which Alabama was admitted to the Union there was a stipulation that the people of Alabama forever disclaimed
*571 all right or title to the waste or unappropriated lands lying * within the State, and that they should remain at the sole disposal of the United States, and a second, that all of the navigable waters within the State should forever remain public highways and free to the citizens of that State and of the United States, without any tax, duty or impost imposed by the State. These provisions were relied upon as a "compact" by which the United States became possessed of all such submerged lands between the shores of navigable rivers within the State.

The points decided were:

First, following *Martin* v. *Waddell,* 16 Pet. 410, that prior to the adoption of the Constitution, the people of each of the original States "held the absolute right to all of their navigable waters and the soil under them for their common use, subject only to the rights since surrendered by the Constitution."

Second. That Alabama had succeeded to all the sovereignty and jurisdiction of all the territory within her limits, to the same extent that Georgia possessed it before she ceded that territory to the United States.

Third. That to Alabama belong the navigable waters, and soils under them.

The court held that the stipulation in the act under which Alabama was admitted to the Union, that the people of the proposed State "forever disclaim all rights and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as law. As to this the court said:

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.
*572 * "And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever State or Territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of

the people of the new State, where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama Territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that Territory amounted to nothing more nor less than rules and regulations respecting the sales and disposition of public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy."

Fourth. As to the stipulation in the same admission act that all navigable waters within the State should forever remain open and free, the court, after deciding that to the original States belonged the absolute right to the navigable waters within the States and the soil under them for the public use, "subject only to the rights since surrendered by the Constitution," said:

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has * been admitted into the union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding.

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The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

This deduction finds support in *Permoli* v. *First Municipality,* 3 How. 589, from which we have heretofore used an excerpt; and in *Strader* v. *Graham,* 10 How. 82; *Withers* v. *Buckley et al.,* 20 How. 84, 93; *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 688; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 160; *Huse* v. *Glover,* 119 U. S. 543; *Sands* v. *River Co.,* 123 U. S. 288, 296; *Ward* v. *Race Horse,* 163 U. S. 504; *Bolln* v. *Nebraska,* 176 U. S. 83, 87.

That the power of Congress to regulate commerce among the States involves the control of the navigable waters of the United States over which such commerce is conducted is undeniable; but it is equally well settled that the control of the State over its internal commerce involves the right to control and regulate navigable streams within the State until Congress acts on the subject. This has been the uniform holding of this court since *Willson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 683.

Many of the cases cited above presented the question as to whether state regulation of its own navigable waters, valid as an exercise of its power as a State until Congress should regulate the subject, was invalid because that "plenary power" had been cut down, not by a regulation * of the general subject by Congress, but as a result of a supposed compact, condition or restriction accepted by the State as a condition upon which it was admitted into the Union.

*574

It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Williamette Bridge Co.* v. *Hatch,* 125 U. S. 1, 9. *Pollard's Lessee* v. *Hagan, supra.*

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the State, if construed as forbidding a removal by the State after its admission as a State, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new States. If powers to impose such a restriction upon the general and undelegated power of a State be conceded as implied from the power to admit a new State, where is the line to be drawn against restrictions imposed upon new States? The insistence finds no support in the decisions of this court. In *Withers* v. *Buckley,* 20 How. 84, 92, 93, where it was contended that certain legislation of the State of Mississippi interfering with the free navigation of one of the navigable streams of the State,
*575 conflicted * with one of the stipulations in the act under which the State had been admitted to the Union, Congress not having otherwise legislated upon the subject, it was said:

"In considering this act of Congress of March 1st, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee* v. *Hagan,* 3 How. p. 223."

In *Escanaba Co.* v. *Chicago,* cited above, it was contended that the control of the State of Illinois over its internal waters had been restricted by the ordinance of 1787, and by the reference to that ordinance in the act of Congress admitting the State. Concerning this insistence, this court, speaking by Mr. Justice Field, said:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States in all respects whatever.' 3 Stat.

536. Equality of constitutional right and power is the condition of all the
*576 States of the Union, old and new. * Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Permoli* v. *Municipality,* id. 589; *Strader* v. *Graham,* 10 id. 82."

In *Ward* v. *Race Horse, supra,* the necessary equality of the new State with the original States is asserted and maintained against the claim that the police power of the State of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the State of Wyoming.

In *Bolln* v. *Nebraska,* 176 U. S. 83, 89, it appeared that the act under which Nebraska had been admitted had, among other things, required the convention organized to form a constitution for the proposed State to adopt for the people of that State the Constitution of the United States. This was done. It was claimed as a result that the power of the State to authorize the prosecution of a felony by information had been restricted, because the United States could, under one of the amendments to the Constitution, prosecute only by indictment. In respect to this claim the court said:

"But conceding all that can be claimed in this connection, and that the State of Nebraska did enter the Union under the condition of the Enabling Act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the State acknowledged, as every other State has done, the supremacy of the Federal Constitution. The first section of the act of 1867, admitting the State into the Union, declared: 'that it is hereby admitted into the Union upon an equal footing with the original States in all respects whatsoever.' It is impossible to suppose that, by such indefinite language as was used in the Enabling Act, Congress intended to differen-
*577 tiate Nebraska from her sister * States, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her constitution from that given to the constitutions of other States. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatsoever.' "

We are unable to find in any of the decisions of this court cited by counsel for the appellants anything which contravenes the view we have expressed. *Green* v. *Biddle,* 8 Wheat. 1, involved the question as to whether a compact between two States, assented to by Congress, by which private land titles in Kentucky, derived from Virginia before the separation of Kentucky from Virginia, "should remain valid and secure under the laws of the proposed State of Kentucky, and should be determined by the laws now existing in this (Virginia) State." By subsequent legislation of the State of Kentucky these titles were adversely affected. This court held that this legislation impaired the obligation of a valid contract within that clause of the Constitution forbidding such im-

pairment. Neither does *Virginia* v. *West Virginia,* 11 Wall. 39, have any bearing here. The question there was one of compact between the two States, assented to by Congress, concerning the boundary between them. Both the cases last referred to concerned compacts between States, authorized by the Constitution when assented to by Congress. They were therefore compacts and agree-
*578 ments * sanctioned by the Constitution, while the one here sought to be enforced is one having no sanction in that instrument.

Beecher v. *Wetherby,* 95 U. S. 517, involved the validity of the grant of every sixteenth section in each township for school purposes. The grant was made by the act providing for the organization of a state government for the Territory of Wisconsin, and purported to be upon condition that the proposed State should never interfere with the primary disposal of the public lands of the United States, nor subject them to taxation. The grant was held to operate as a grant taking effect so soon as the necessary surveys were made. The conditions assented to by the State were obviously such as obtained no force from the assent of the State, since they might have been exacted as an exertion of the proper power of Congress to make rules and regulations as to the disposition of the public lands. *Minnesota* v. *Bachelder,* 1 Wall. 109, is another case which involved nothing more than an exertion by Congress of its power to regulate the disposition of the public lands.

The case of the *Kansas Indians,* 5 Wall. 737, involved the power of the State of Kansas to tax lands held by the individual Indians in that State under patents from the United States. The act providing for the admission of Kansas into the Union provided that nothing contained in the constitution of the State should be construed to "impair the rights of persons or property pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty with such Indians." It was held that so long as the tribal organization of such Indians was recognized as still existing, such lands were not subject to taxation by the State. The result might be well upheld either as an exertion of the power of Congress over Indian tribes, with whom the United States had treaty relations, or as a contract by which the State had agreed to forego
*579 taxation of Indian lands, a contract quite * within the power of a State to make, whether made with the United States for the benefit of its Indian wards, or with a private corporation for the supposed advantages resulting. Certainly the case has no bearing upon a compact by which the general legislative power of the State is to be impaired with reference to a matter pertaining purely to the internal policy of the State. See *Stearns* v. *Minnesota,* 179 U. S. 223.

No good can result from a consideration of the other cases cited by plaintiffs in error. None of them bear any more closely upon the question here involved than those referred to. If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new State have complied with the terms of the act that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on*

an equal footing with the original States." The proclamation has been issued and the Senators and Representatives from the State admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

In *Texas* v. *White,* 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States."

In *Lane County* v. *Oregon,* 7 Wall. 76, he said:

*580 * "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Holmes dissent.

II

THE NATURE AND EXTENT OF JUDICIAL POWER OF THE CONSTITUTION AND ITS RELATION TO THE LEGISLATIVE AND EXECUTIVE POWER OF THE UNITED STATES.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals. (*M. de Montesquieu, L'Esprit des Lois, 2 Vols., 1748, English translation of 1756, Vol. I, Book XI, Chap. VI, p. 165.*)

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

The province of the court is, solely, to decide on the rights of individuals not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. (*Chief Justice Marshall in Marbury* v. *Madison, 1 Cranch, 137, 166, 170, decided in 1803.*)

It is emphatically the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. (*Chief Justice Marshall in Marbury* v. *Madison, 1 Cranch, 137, 177–178, decided in 1803.*)

The judicial power mentioned in the Constitution, and vested in the Courts, means the power conferred upon Courts ordained and established by and under the Constitution, in the strict and appropriate sense of that term—Courts that compose one of the three great departments of the government prescribed by the fundamental law, the same as the other two, the legislative and the executive. (*Mr. Justice Nelson on The Fugitive Slave Law, 1 Blatchford, Appendix, p. 644, decided in 1851.*)

The position and rank, therefore, assigned to this Court in the Government of the United States, differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights.

The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise

certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured. (*Chief Justice Taney in Gordon* v. *United States, 117 United States, 697, 700–701, decided in 1864.*)

It was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government: its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments. (*Chief Justice Taney in Gordon* v. *United States, 117 United States, 697, 701, decided in 1864.*)

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. (*Chief Justice Taney in Gordon* v. *United States, 117 United States, 697, 701, decided in 1864.*)

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. . . . By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. . . .

On the other hand, in Article III, which treats of the judicial department . . . we find that section 1 reads that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the Nation. . . .

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. (*Mr. Justice Brewer in Kansas* v. *Colorado, 206 United States,* 46, *81–83, decided in 1907.*)

Opinions on Judicial Powers of the Federal Judges.

Circuit Courts of the United States, 1792.

[2 *Dallas,* 410, *Note.*]

An act of Congress "to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions," was approved by President Washington on March 23, 1792.[1] Section 2 of this act provided:

"First. Every applicant shall attend the court in person, except where it shall be certified by two magistrates that he is unable to do so, and shall produce to the circuit court, the following proofs, . . . Secondly. The circuit court, upon receipt of the proofs aforesaid, shall forthwith proceed to examine into the nature of the wound, or other cause of disability of such applicant, and having ascertained the degree thereof, shall certify the same, and transmit the result of their inquiry, in case, in their opinion, the applicant should be put on the pension list, to the Secretary of War, together with their opinion in writing, what proportion of the monthly pay of such applicant will be equivalent to the degree of disability ascertained in manner aforesaid."

Section 3 provided:

"And it shall be the duty of the judges of the circuit courts respectively, during the term of two years from the passing of this act, to remain at the places where the said courts shall be holden, five days at the least from the time of opening the sessions thereof, that persons disabled as aforesaid, may have full opportunity to make their application for the relief proposed by this act."

Section 4 provided:

"That in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list, and make report of the same to Congress, at their next session."

The Circuit Courts for New York, Pennsylvania and North Carolina considered these sections of the act and the action, if any, which they should take under it, and, as stated in the note to Hayburn's Case (2 Dallas, 409), decided in 1792, each took the following action.

The Circuit court for the district of New-York (consisting of JAY, *Chief Justice,* CUSHING, *Justice,* and DUANE, District Judge) proceeded on the 5th of April, 1791 [1792], to take into consideration the act of Congress entitled "An "act to provide for the settlement of the claims of widows and orphans barred by "the limitations heretofore established, and to regulate the claims to invalid "pensions;" and were, thereupon, unanimously, of opinion and agreed,

"That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

[1] 1 Stat. L. 243.

"That neither the *Legislative* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit court, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the Revision of the legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* description.

"That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature, they will execute this act in the capacity of commissioners.

"That as the Legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed.

"That the Judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed as commissioners to execute the business of this act in the same court room, or chamber."

*411 * The Circuit court for the district of Pennsylvania, (consisting of WILSON, and BLAIR, *Justices*, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.' Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion,[1] governed us with regard to an act passed by the legislature of the Union.

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[1] In an interesting and instructive article, entitled "The First Hayburn Case, 1792," published in 1908 in the American Historical Review, Vol. XIII, pp. 281, 283–284, Professor Max Farrand has this to say concerning the above subject:

"The 'painful occasion' referred to was the action of the court just one week previous upon the application of William Hayburn for a pension under the Act of 1792. The following record is copied from the docket of the court:

"'At a Circuit Court of the United States in and for the Pennsylvania District, etc.

"'11th day of April, 1792, before Wilson, Blair and Peters.

"'The petition of William Hayburn, was read and after due deliberation thereupon had it is considered by the Court that the same be not proceeded upon.'"

"This action, which it has seemed advisable to call the 'first Hayburn case,' has been obscured by the Hayburn case before the Federal Supreme Court at the August term, 1792, when Attorney-General Randolph moved for a *mandamus* to the circuit court for the district of Pennsylvania, commanding it to proceed and hear the petition of Hayburn—a motion which the court held under advisement until Congress had modified the objectionable features of the statute, as noticed above, and upon which no return was ever made."—Editor.

"The people of the United States have vested in Congress all *legislative* powers 'granted in the constitution.'

"They have vested in one Supreme court, and in such inferior courts as the Congress shall establish, 'the *judicial* power of the United States.'

"It is worthy of remark, that in Congress the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the Constitution.'

"This Constitution is 'the Supreme Law of the Land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'

"It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their *judicial* power not in Congress, but in *'courts.'* They have ordained that the 'Judges of those courts shall hold their offices during good behaviour,' and that 'during their continuance in office, their salaries shall not be diminished.'

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.'

"Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded *without* constitutional authority.

"2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and,
*412 consequently, with that * important principle which is so strictly observed by the Constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."

The Circuit court for the district of North Carolina (consisting of IREDELL, *Justice,* and SITGREAVES, District Judge) made the following representation in a letter jointly addressed to the President of the United States, on the 8th of June, 1792.

"We, the judges now attending at the Circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled 'An act to provide for the settlement of the

claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following:—

"1. That the Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the Legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"3. That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating *Judicial power,* for the exercise of which any act of the legislature is provided, in exercising
*413 (even under the authority of another act) * any power not in its nature *judicial,* or, if *judicial,* not provided for upon the terms the Constitution requires.

"4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution; for, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure the office of Secretary at War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"These, sir, are our reasons for being of opinion, as we are at present, that this Circuit court cannot be justified in the execution of that part of the act,

which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether in our opinion such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.

"The high respect we entertain for the Legislature, our feelings as men for persons, whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the Judges of it; and as the Secretary at War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to with-hold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law.

We do not mean, however, to preclude ourselves from a very deliberate
*414 * consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion, in any case extra-judicially, because we know well how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly, much more deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a long one, we determined at all events to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being as far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be from so low a sense of duty, as we think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on Judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous."

Hayburn's Case.

Supreme Court of the United States, 1792.

[2 *Dallas*, 409.]

It is not in the power of congress, to assign to the judiciary any but judicial duties.

THIS was a motion for a *mandamus* to be directed to the *Circuit Court for* the district of *Pennsylvania*, commanding the said court to proceed in a certain petition of *William Hayburn*, who had applied to be put on the pension list of the *United States*, as an invalid pensioner.

The principal case arose upon the act of Congress passed the *23d* of *March*, 1792.

The Attorney General (*Randolph*) who made the motion for the *mandamus*, having premised that it was done *ex officio*, without an application from any particular person, but with a view to procure the execution of an act of Congress, particularly interesting to a meritorious and unfortunate class of citizens, THE COURT declared that they entertained great doubt upon his right, under such circumstances, and in a case of this kind, to proceed *ex officio;* and directed him to state the principles on which he attempted to support the right. The Attorney General, accordingly, entered into an elaborate description of the powers and duties of his office:—

But THE COURT being divided in opinion on that question, the motion, made *ex officio*, was not allowed.

The Attorney General then changed the ground of his interposition, declaring it to be at the instance, and on behalf of *Hayburn*, a party interested; and he entered into the merits of the case, upon the act of Congress, and the refusal of the Judges to carry it into effect.

THE COURT observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the Legis-
*410 lature, at an intermediate * session, provided, in another way, for the relief of the pensioners.

*411 * RULE.

THE Attorney General having moved for information, relative to the system of practice by which the Attorneys and Counsellors of this court shall reg-
*412 ulate themselves, and of * the place in which rules in causes here depending shall be obtained, the CHIEF JUSTICE, at a subsequent day stated, that—

*413 * THE COURT considers the practice of the courts of *King's Bench*
*414 and *Chancery* in *England*, as affording outlines for the * practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

United States v. Yale Todd.

Supreme Court of the United States, 1794.

[13 *Howard*, 52, *Note.*]

Federal judges cannot, as commissioners, exercise non-judicial power which they could not exercise as judges, and money paid by the United States on a holding by them as commissioners can be recovered in an appropriate suit at law.

In the course of Mr. Chief Justice Taney's opinion in the case of U. S. *v.* Ferreira (13 Howard, 40), reference was made to Hayburn's Case (2 Dallas, 409) and to the action of the Circuit Courts on the Act of Congress of 1792. After the delivery of the opinion in the Ferreira case, Chief Justice Taney's attention was called to the case of United States *v.* Todd, of which he made the following note, which, by order of the court, was "inserted" in the case under discussion.

Mr. Chief Justice Taney.

Since the foregoing opinion was delivered, the attention of the court has been drawn to the case of the United States *v.* Yale Todd, which arose under the act of 1792, and was decided in the Supreme Court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to Hayburn's case. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in Yale Todd's case is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The 2d, 3d, and 4th sections of the act of 1792, were repealed at the next session of Congress by the act of February 28, 1793. It was these three sections that gave rise to the questions stated in the note to Hayburn's case. The repealing act provided another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the 3d section it saved all rights to pensions which might be founded "upon any legal adjudication," under the act of 1792, and made it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court, "on the validity of such rights, claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the act of 1792, immediately after its passage and before it was repealed. And the saving and proviso, in the act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the justices, and was introduced for the purpose of having it determined, whether under the act conferring the power upon the Circuit Courts, the judges of those courts when refusing for the reasons assigned by them to act as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this act of Congress, the case of Yale Todd was brought before the Supreme Court, in an amicable action, and upon a case stated at February Term, 1794.

The case was docketed by consent, the United States being plaintiff and Todd

the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit.*

*53 * The case as stated, admitted that on the 3d of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing, and Richard Law, then being judges of the Circuit Court held at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as commissioners designated in the said act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two-thirds of his former monthly wages, which they understood to have been eight dollars and one-third per month, and the sum of one hundred and fifty dollars for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the Circuit Court sitting as commissioners, and not as a Circuit Court, had power and authority by virtue of said act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy-two dollars and ninety-one cents, and six cents cost.

The case was argued by Bradford, Attorney-General for the United States, and Hillhouse for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justice Cushing, Wilson, Blair, and Paterson, were present at the decision. No opinion was filed stating the grounds of the decision. Nor is any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the Supreme Court of that day in the note to Hayburn's case, and in the case of the United States *v.* Todd, is this:

1. That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States.

The case of Todd was docketed by consent in the Supreme Court; and the court appears to have been of opinion that the act of Congress of 1793, directing the Secretary of War and Attorney-General to take their opinion upon the question, gave them original jurisdiction. In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress can not enlarge it. In all other cases its power must be appellate.

The United States, Appellants, v. Francis P. Ferreira, Administrator of Francis Pass, Deceased.

Supreme Court of the United States, 1851.

[13 *Howard,* 40.]

The treaty of 1819, between the United States and Spain, contains the following stipulation, viz.:—

"The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Congress, by two acts passed in 1823 and 1834, (3 Stat. at L., 768, and 6 Stat. at L., 569,) directed the judge of the Territorial Court of Florida to receive, examine, and adjudge all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the treaty, should pay the amount thereof; and by an act of 1849, (9 Stat. at L., p. 788,) Congress directed the judge of the District Court of the United States for the Northern District of Florida, to receive and adjudicate certain claims in the manner directed by the preceding acts.

From the award of the district judge, an appeal does not lie to this court.

As the treaty itself designated no tribunal to assess the damages, it remained for Congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it, conferred upon the Secretary of the Treasury.

THIS was an appeal from the District Court of the United States for the Northern District of Florida.

The facts of the case are stated in the opinion of the court. . . .

Mr. Chief Justice TANEY delivered the opinion of the court.

This purports to be an appeal from the District Court of the United
*45 * States for the Northern District of Florida. The case brought before the court is this:

The treaty of 1819 by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article.

"The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In 1823 Congress passed an act to carry into execution this article of the treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the treaty above mentioned; and the 2d section provides "that in all cases where the judges shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."

Under this law the Secretary of the Treasury held that it did not apply to injuries suffered from the causes mentioned in the treaty of 1812 and 1813, but to those of a subsequent period. And in consequence of this decision, another law was pased in 1834, extending the provisions of the former act to injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year from the passage of the act. This law embraced the claim of the present claimant.

He did not, however, present his claim within the time limited. And in 1849 a special law was passed authorizing the District Judge of the United States for the Northern District of Florida, to receive and adjudicate this claim and that of certain other persons mentioned in the law, under the act of 1834; the several claims to be settled by the Treasury as in other cases under the said act. Florida had become a State of the Union in 1849, and therefore the District Judge was substituted in the place of the territorial officer.

Ferreira presented his claim according to the District Judge, who took the testimony offered to support it, and decided that the amount stated in the proceedings was due to him. The District Attorney of the United States, prayed an appeal to this court, from this decision; and under that prayer the case has been docketed here as an appeal from the District Court.

*46 * The only question now before us is whether we have any jurisdiction in the case. And in order to determine that question we must examine the nature of the proceeding, before the District Judge, and the character of the decision from which this appeal has been taken.

The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust

the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding or the character in which the law authorizes it to act, under any opinion it may entertain, that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law and must obey the law.

The territorial judges therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned; and their decisions can be entitled to no higher respect or authority than these laws gave them. They are referred by the act of 1823, to the treaty for the description of the injury which the law requires them to adjust; but not to enlarge the powers which the law confers, nor to change the character in which the law authorizes them to act.

The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to
*47 obtain. But neither the evidence, nor * his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards

of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the Secretary, over the decision of the District Judge, is therefore a violation of the treaty.

The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created, where
*48 one nation agrees by * treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions; and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal.

And if the judicial branch of the government had the right to look into the construction of the treaty in this respect, and was of opinion that it required a judicial proceeding; and that the power given to the Secretary was void as in violation of the treaty, it would hardly strengthen the case of the claimant on this appeal. For the proceedings before the judge are as little judicial in their character as that before the Secretary. And if his decisions are void on that account, the decisions of the judge are open to the same objections; and neither the principal nor interest, nor any part of this claim could be paid at the Treasury. For if the tribunal is unauthorized, the awards are of no value.

The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any

other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. But is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

The proceedings we are now considering, did not take place before one of the territorial judges, but before a District Judge of the United States. But that circumstances can make no difference. For the act of 1849, authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the act of 1834; and provides that these claims may be settled by the Treasury, as other cases under the said act. It conferred on the District Judge, *49 therefore, the same power, and the same character, * and imposed on him the same duty that had been conferred and imposed on the territorial judges before Florida became a State.

It would seem, indeed, in this case, that the District Judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the District Attorney appeared for the United States, and argued the case, and prayed an appeal. But the acts of Congress require no petition. The claimant had nothing to do, but to present his claim to the judge with the vouchers and evidence to support it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the Secretary. But the acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

The question as to the character in which a judge acts in a case of this description, is not a new one. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dall. 409.

The act of 23d of March, in that year, required the Circuit Courts of the United States to examine into the claims of the officers and soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to Congress at its next session. The authority was given to the Circuit Courts; and a question arose whether the power conferred was a judicial one, which the Circuit Courts, as such, could constitutionally exercise.

The question was not decided in the Supreme Court in the case above mentioned. But the opinions of the judges of the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

The judges in the New York Circuit, composed of Chief Justice Jay, Justice

Cushing, and Duane, District Judge, held that the power could not be
*50 exercised by them as a court. But in * consideration of the meritorious and benevolent object of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court

The judges of the Pennsylvania Circuit, consisting of Wilson and Blair, Justices of the Supreme Court and Peters, District Judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the Secretary of War and Congress.

The judges of the Circuit Court of North Carolina, composed of Iredell, Justice of the Supreme Court, and Sitgreaves, District Judge, were of opinion that the court could not execute it as a judicial power; and held it under advisement whether they might not construe the act as an appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of the New York Circuit.

These opinions, it appears by the report in 2 Dall., were all communicated to the President, and the motion for a mandamus in Hayburn's case, at the next term of the Supreme Court, would seem to have been made merely for the purpose of having it judicially determined in this court, whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except Thomas Johnson, whose opinion is not given, had formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a Secretary and of Congress, could not be executed by the court as a judicial power: and the only question upon which there appears to have been any difference of opinion, was whether it might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the legislature, and a different way provided for the relief of the pensioners: and the question as to the construction of the law was not decided in the Supreme Court. But the repeal of the act clearly shows that the President and Congress acquiesced in the correctness of the decision, that it was not a judicial power.

This law is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine,*
and not personally on the judges. In the case before us it is imposed upon
*51 the judge, and * it appears from the note to the case of Hayburn, that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description; and would have performed the duty as commissioners, subject to the revision and control of the Secretary and Congress, as provided in the law. Nor have Justices Wilson, Blair, and Peters, District Judges, dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace

distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such.

Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the District Court. According to the directions of the act of Congress, the decision of the judge and the evidence on which it is founded, ought to have been transmitted to the Secretary of the Treasury. They are not to remain in the District Court, nor to be recorded there. They legally belong to the office of the Secretary of the Treasury, and not to the court and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the District Court of which a transcript can legally be made and certified; and consequently there is no transcript now before us that we can recognize as evidence of any proceeding or judgment in that court.

A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the senate; and Congress could not by law, designate the persons to fill these offices. And if this be the construction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, every thing that has been done under the acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made might be recovered back by the United States. But this question has not been made; nor does it arise in the case. It could arise only in a suit by the United States to recover back the money. And
*52 * as the case does not present it, and the parties interested are not before the court, and these laws have for so many years been acted on as valid and constitutional we do not think it proper to express an opinion upon it. In the case at bar, the power of the judge to decide in the first instance, is assumed on both sides, and the controversy has turned upon the power of the Secretary to revise it; and it is in this aspect of the case, that it has been considered by the court, in the foregoing opinion.

The appeal must be dismissed for want of jurisdiction. . . .

Gordon v. United States.

Supreme Court of the United States, 1864.

[117 *United States,* 697.]

It is inherent in the judicial power that it result in a judgment in the technical sense of the term, to be executed as rendered by appropriate authority without depending upon the discretion of the legislative or executive department of the Government.

Inasmuch as the Court of Claims could not, until the act of March 17, 1866, render such a judgment, an appeal from its findings did not lie to the Supreme Court of the United States.

This cause was submitted on the 18th December, 1863. On the 4th of April, 1864, the court ordered it to be argued on the second day of the following December Term. Mr. Chief Justice Taney had prepared an opinion expressing his views upon the question of jurisdiction. This he placed in the hands of the clerk in vacation, to be delivered to the judges on their reassembling in December. Before the judges met he died. The clerk complied with his request. It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and that it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so,[1] now prints it with their assent. Irrespective of its intrinsic value, it has an interest for the court and the bar, as being the last judicial paper from the pen of

*698 * Mr. Chief Justice Taney.

This case comes before the court upon appeal from the judgment of the Court of Claims. The appeal is taken under the act of March 3, 1863, entitled "An Act to amend an Act to establish a court for the investigation of claims against the United States."

The 5th section of this act provides that either party may appeal to the Supreme Court of the United States from any final judgment or decree which may thereafter be rendered in any case by the Court of Claims wherein the amount in controversy exceeds $3000, under such regulations as the Supreme Court may direct; *Provided,* that such appeal be taken within ninety days after the rendition of such judgment or decree, and *Provided,* further, that when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any Executive Department of the government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding Justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

The 7th section provides that in all cases of final judgment by the Court of Claims, or, on appeal by the said Supreme Court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private

[1] The following account of the paper is furnished by the gentleman from whom the copy was received. "This copy was made by the late David M. Perine, the life-long friend of Chief Justice Taney, and one of his executors. It was kept by Mr. Perine until his death, a couple of years ago, and since then by his only son and executor, from whom I get it. The original we cannot find; but the copy bears the mark of Mr. Perine as having been 'Ex'd,' and can be relied upon absolutely."

claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the said Court of Claims, and signed by the Chief Justice, or in his absence by the presiding Judge of the court.

The 14th section provides that no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims, till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

It will be seen by the sections above quoted that the claimant whose claim has been allowed by the Court of Claims, or upon appeal by the Supreme Court, is to be paid out of any general appropriation made by law for the payment and satisfaction of private claims: but no payment of any such claim is to be made until the claim allowed has been estimated for by the Secretary of the Treasury, and Congress, upon such estimate, shall make an appropriation for its payment. Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion * to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress.

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So far as the Court of Claims is concerned we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments. In this respect the authority of the Court of Claims is like to that of an Auditor or Comptroller—with this difference only; that in the latter case the appropriation is made in advance, upon estimates, furnished by the different Executive Departments, of their probable expenses during the ensuing years; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by acts of Congress for special purposes, and neither of them possess judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power.

But whether this court can be required or authorized to hear an appeal from such a tribunal, and give an opinion upon it without the power of pronouncing a judgment, and issuing the appropriate judicial process to carry it into effect, is a very different question, and rests on principles altogether different. The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate * functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other.

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The 3d Article of the Constitution, Section 1, provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." And the last clause of the same article, after giving this court original jurisdiction in the cases therein specified, provides that in all other cases "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The existence of this Court is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the courts to exercise any other jurisdiction or power, or perform any other duty. Chancellor Kent says: "The judicial power of the United States is in point of origin and title equal with the other powers of the government, and is as exclusively vested in the court created by or pursuant to the Constitution, as the legislative power is vested in Congress, or the executive power in the President." 1 Kent Com. 290–291, 6th ed. See also Story Const., pp. 449–450.

The position and rank, therefore, assigned to this Court in the Government of the United States, differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights.

The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action,
*701 * and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

In No. 38 of the Federalist, written by Mr. Madison, the necessity and object of this provision is clearly stated. In that number, after explaining with great perspicuity the complex character of the government, being partly National and partly Federal, he proceeds to say (page 265 Towson's Ed.): "In this relation, then, the proposed government cannot be deemed a *national* one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the

tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact."

It was to prevent an appeal to the sword and a dissolution of the compact that this Court, by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government: its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive Departments. And it is upon the principle of the perfect independence of this Court, that in cases where the Constitution gives its original jurisdiction, the action of Congress has not deemed necessary to regulate its exercise, or to prescribe the process to be used to bring the parties before the court, or to carry its judgment into execu-
*702 tion. The jurisdiction and judicial power being vested in the court, * it proceeded to prescribe its process and regulate its proceedings according to its own judgment, and Congress has never attempted to control or interfere with the action of the court in this respect.

The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make. But the appeal is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States. The inferior court, therefore, from which the appeal is taken, must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress cannot extend the appellate power of this Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a Commissioner or Auditor or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect.

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely a opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court, in the exercise of its appellate jurisdiction: yet it is the whole power that the Court is allowed to exercise under this act of Congress.

It is true the act speaks of the judgment or decree of this Court. But all that the Court is authorized to do is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates, and Congress sanctions it by an

appropriation, it is then to be paid, but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for this claim, *703 like all other estimates of the Secretary, will be opened to debate, * and whether the appropriation will be made or not will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it.

This precise point was decided by this Court as long ago as 1792, in *Hayburn's Case,* 2 Dall. 409, and this decision has ever since been regarded as a constitutional law, and followed by every department of the government: by the legislative and executive branches as well as the Judiciary. It is referred to and recognized as authority in *United States* v. *Ferreira,* 13 How. 40. The case of Hayburn arose under an Act of Congress of March, 1792, which required the Circuit Courts of the United States to examine into the claims of the officers, soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determiue the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court, and to report the case to Congress at its next session. But every judge of the Supreme Court (except Thomas Johnson of Maryland, who does not appear to have had the question before him) was of opinion that the law was unconstitutional and void, and that when the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power, and could not therefore be executed by the court. These opinions were all communicated to General Washington, who was then President of the United States, and the law was repealed at the next session.

The case of the *United States* v. *Ferreira,* 13 How. 40, hereinbefore referred to, was decided on the same principle, and the distinction taken between judicial power in the sense in which these words are used in the Constitution, and a power given by law to examine a particular class of cases, and to certify an opinion as to their respective merits to an officer of the Executive Department, who might or might not act on it. Speaking of the laws under which the judge acted, the Court says, p. 48, "The powers conferred by these acts of Congress upon the judge, as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commis- *704 sioner * appointed to adjust claims to land or money under a treaty; or special powers to inquire into or decide any other particular class of controversies, in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a Commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the Courts of the United States."

And it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

Indeed no principle of constitutional law has been more firmly established

or constantly adhered to, than the one above stated—that is, that this Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

It was upon this principle that the case of *Hunt* v. *Pallas,* 4 How. 589, was decided. That case was originally decided in the territorial court of Florida. When the Territory became a State, Congress omitted to make provision for the transfer of the records to a tribunal of the United States, or to provide any tribunal to which a mandate might be directed, if any of the judgments of the territorial court should be affirmed or reversed. A motion was made here for a writ of error to be directed to the judges of the State court. But the motion was overruled, and the court said: "It would be useless and vain for this Court to issue a writ of error, and bring up the record and proceed to judgment upon it, when, as the law now stands, no means or process is authorized, by which our judgment could be executed."

The decision in *Hunt* v. *Pallas* was recognized and the principle again affirmed in the case of *McNalty* v. *Batty,* 10 How. 72, 79, and in a multitude of cases which have occurred since the present troubles began. The court has uniformly refused to take jurisdiction where there was not a court of the United States in existence, in possession of the original record, to which we were authorized by law to send a mandate to carry into effect the judgment of this court. The mandate is the form in which the judgment of this court is given, upon an
*705 appeal from an inferior court, * *West* v. *Brashear,* 14 Pet. 51; and the court can give no judgment, and award no execution, unless there is an inferior court of the United States, in possession of the original record, over which this court has appellate power, and which it may compel to execute its judgments. If no such court exists, it could merely express an opinion, which, as we have said before, binds no one, is no judgment in the legal sense of the term, and may or may not be carried into effect at the pleasure of Congress. In relation to appeals from a State court, there is a special provision in the act of 1789, authorizing, in certain contingencies, a judgment and execution by this court.

The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI., the laws of Congress are made the supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people. The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution.

This power over legislative acts is not possessed by the English courts. They cannot declare an act of Parliament void, because in the opinion of the court it is inconsistent with the principles of Magna Charta or the Petition of Rights. They are bound to obey it and carry it into execution. Yet, in that country, the independence of the Judiciary is invariably respected and upheld by the King and the Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution, and *706 where it is inoperative and of no value, * unless sanctioned by a future act of Parliament. The judicial power is carefully and effectually separated from the executive and legislative departments. The language of Blackstone upon this subject is plain and unequivocal. 1 Bl. Com. 268, 269.

"In this distinct and separate existence (says Blackstone) of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated from the legislative and executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, the union might soon be an overbalance for the legislative. For which reason, by Stat. Car. I. c. 10, which abolished the Court of Star Chamber, effectual care is taken to remove all judicial power out of the hands of the King's Privy Council, which it was then evident, from recent instances, might soon be inclined to pronounce that for law which was most agreeable to the Prince or his officers."

These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.

For the reasons above stated we are of opinion that this appeal cannot be sustained, and it is therefore

Dismissed for want of jurisdiction.

Railroad Company v. State of Tennessee.

Supreme Court of the United States, 1879.

[101 *United States*, 337.]

The Constitution of Tennessee, in force in 1838, declares that "suits may be brought against the State in such manner and in such courts as the legislature may by law direct." The statute of 1855 providing that actions might be instituted against the State under the same rules and regulations that govern those between private citizens, but conferring

no power on the courts to execute their judgments, was repealed in 1865. No other law was enacted prescribing the manner or the courts in which the State could be sued. In a suit subsequently brought by the State in 1872 against the Bank of Tennessee and certain of its creditors, A., who was admitted a defendant, filed a cross-bill, setting up that while the first statute was in force the bank became indebted to him, and, praying that under the indemnity clause of its charter a decree be rendered against the State for the amount of the debt. The cross-bill was dismissed solely upon the ground that the State could not be sued in her own courts. *Held,* that the repealing statute of 1865 did not impair the obligation of a contract, within the meaning of the contract clause of the Constitution of the United States.

*338 * ERROR to the Supreme Court of the State of Tennessee.

The facts are stated in the opinion of the court. . . .

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

On the 19th of January, 1838, the State of Tennessee established a bank in its own name and for its own benefit, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. The State was the only stockholder, and entitled to all the profits of the business. The bank was by its charter capable of suing and being sued. At that time the Constitution of the State contained this provision: "Suits may be brought against the State in such manner and in such courts as the legislature may by law direct." Art. 1, sect. 17. No law had then been passed giving effect to this express grant of power, but in 1855 it was enacted that actions might be instituted against the State under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. Code, sect. 2807. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the legislature.

In 1865, this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the State. On the 16th of February, 1866, an act was passed to wind up and settle the affairs of the bank, under which an assignment of all the property was made to Samuel Watson, trustee. Afterwards, on the 16th of May, 1866, the State and the trustee filed a bill in equity, in the Chancery Court at Nashville, against the bank and its creditors, for an account of debts and assets and a decree of distribution. . . .

*339 * The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to

enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if
*340 the * right is no more available afterwards than before. The Constitution preserves only such remedies as are required to *enforce* a contract.

Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfilment. The courts are powerless. Every thing after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty.

It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given. This renders it unnecessary to consider whether in this suit a cross-bill could have been maintained by the railroad company if the right to sue had been continued, and also whether a remedy given after the charter of the bank was granted, but in force when the debt of the bank was incurred, might be taken away without impairing the obligation of the contract of the State to indemnify the creditors against loss by reason of any deficiency in the capital. Neither do we find it necessary to determine what would be a complete judicial remedy against a State, nor whether, if such a remedy had been given, the obligation of a contract entered into by the
*341 State when it was in existence * would be impaired by taking it away. What we do decide is that no such remedy was given in this case.

Judgment affirmed.

Mr. Justice Swayne and Mr. Justice Strong dissented.

United States v. Evans.

Supreme Court of the United States, 1909.

[213 *United States*, 297.]

Under § 935 of the Code of the District of Columbia, act of March 3, 1901, c. 854, 31 Stat. 1341, a writ of error will not lie from the Court of Appeals to the Supreme Court of the District at the instance of the Government to review a judgment based on a verdict of not guilty.

When the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal for the purpose of establishing a rule of observance in cases subsequently arising is not an exercise of judicial power.

Writ of certiorari to review 30 App. D. C. 58, quashed.

THE facts are stated in the opinion. . . .

*299 * MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Appellees were tried under an indictment for murder in the Supreme Court of the District of Columbia on February 1, 1907, and found not guilty. The United States appealed to the Court of Appeals of the District, and assigned error on exceptions taken during the trial to the exclusion of certain evidence. This right to appeal was claimed under § 935 of the code, which reads as follows:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions; provided, that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

The appeal was dismissed for want of jurisdiction, and the case brought here on certiorari.

The case of *United States* v. *Sanges*, 144 U. S. 310, reiterated the then well-settled rule that the right of review in criminal cases was limited to review at the instance of the defendant after a decision in favor of the Government. *United States* v. *Dickinson, ante*, p. 92.

In *United States* v. *Evans*, 28 App. D. C. 264, under § 935 of the code, the right was exercised without question in a case where an indictment had been set aside on demurrer, and Chief Justice Shepard, in delivering the opinion of the court in this case (30 App. D. C. 58), said:

"It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy."

But the Chief Justice further said that it was contended by appellants that a writ of error lies also "upon a judgment where there has been a verdict
*300 of not guilty, not, however, to obtain * a reversal of that judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise."

But this contention was rejected by the court in view of the objectionable consequences that would result from such an exercise of jurisdiction. "The

appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

It was in the light of these considerations that the act of Congress of March 2, 1907, 34 Stat. 1246, c. 2564, was subjected to the limitations therein contained. *United States* v. *Keitel,* 211 U. S. 370, 398; *United States* v. *Mason, ante,* p. 115.

By the constitutions of several of the States the justices of the highest judicial tribunals are obliged to give their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or the governor or governor and council, and there are many interesting discussions in the state reports, as well as in articles by the law writers, in respect of such a provision.

But no such requirement obtains in Federal jurisprudence.

Such a provision was suggested in the Federal Constitutional Convention, but disappeared in the Committee on Detail.

*301 * In 1793 President Washington sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France, but they declined to respond. Marshall thus speaks of the matter in his Life of Washington:

"About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." Story on the Constitution, § 1571.

It was long ago held by this court that the discharge of such a function was not an exercise of judicial power. *United States* v. *Ferreira,* 13 How. 40, note on page 52; *Hayburn's Case,* 2 Dall. 409; see note, pp. 410, 411, 412, 413, 414. And that ruling sustains the conclusion of the Court of Appeals, in the matter of the construction of this act to which the opinion is confined.

Writ of certiorari quashed.

Winthrop v. Lechmere.

Privy Council, 1728.

[7 *Connecticut Colonial Records,* 571.]

The acts of a colonial legislature empowered by its charter "to Make, Ordain, and Establish all Manner of Wholesome and Reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm, of England" are, if repugnant to or inconsistent with "the Laws of this Realm," null and void and of no effect, and will be so declared in a judicial proceeding by the King in Council.

All decisions of courts of justice of the said colonies based upon an act of the colonial legislature contrary to the laws of England, in accordance with and sustaining the terms of the colonial law, will, upon appeal, be reversed and set aside in a judicial proceeding by the King in Council.

General Wait Still Winthrop died in 1717, intestate, and the administration of his estate was committed to John Winthrop, who claimed all the real estate, and also the estate of his uncle Fitz John Winthrop, as the heir under the common law of England. In 1711 Winthrop had removed from Boston to New London, to devote himself to the improvement of the family property in Connecticut. This occupation was ill-suited to his tastes and habits; he became unpopular by reason of lawsuits and litigation with his tenants and neighbors, and he also involved himself in disastrous mining speculations. His only sister, Ann Winthrop, had married Thomas Lechmere, of Boston, at one time surveyor-general of the New England colonies, and in 1724 her husband applied to the court of probate, claiming in right of his wife a proportion of the real estate of Wait Still Winthrop, and that he was kept out of it by the administrator's not having inventoried and administered the same. Winthrop replied by exhibiting an inventory of the personal estate, and claiming that administrators had nothing to do with lands, as they belonged to the heir-in-law, in this case himself, according to the law of England. After nearly two years of litigation, by a decree of the Superior Court of Connecticut, March 22, 1725–6, the letters of administration granted to Winthrop were vacated, and Thomas Lechmere and Ann his wife were appointed administrators of the estate. Winthrop presented a petition at the next session of the General Assembly, and declared that he would appeal to the King in Council, thus ignoring the highest court in Connecticut, where the case should have been carried, according to the laws of the colony. . . .

Winthrop went to England and presented his cause before the home government, representing that the colonial law which allowed daughters to receive real estate in the distribution of the property of an intestate person was in violation of the law of England, and the case was tried before his Majesty in Council. . . .

The Law of Intestate Estates, which had been in operation since October, 1699, . . . was taken from an act passed in Massachusetts in 1692, under the charter granted by King William and Queen Mary, Oct. 7, 1691. This law provided for the settlement and distribution of the estates of intestates: the

eldest son to have double portion, or two shares; if no son, the daughters to inherit as copartners.[1]

Yorke, *Attorney General,* and Talbot, *Solicitor General,* for the appellant.[2]

What Lechmere's council will insist on to support the whole of his proceedings is a printed Act the[y] find amongst the Connecticut printed laws, fo. 60, intituled an Act for Settlemt of Intestate's Estates. . . .

But as to this Act we answer & insist (first) that it is an obsolete act, made in the infancy of the Province, and long since out of use and not of any force or regard in the Province . . .; tho' if this law was not obsolete, we insist (secondly) that the same is void in it self as being not warranted by the Charter, and can no ways influence the present case. For by the Charter their power of making laws is restrained and limitted in a very special manner, (vizt) such laws must be wholsome and reasonable, and[3] [not] contrary to the laws of this realm of England, and then by the Charter the inhabitants may have, take, possess, &c., lands, &c., and the same dispose of as other the leige people of the realm of England, and were to enjoy all liberties & immunities of natural born subjects, and the soil of the whole Province is granted to the Govr & Compa, and their successors and assigns for ever, upon trust and for the use & benefit of themselves and their associates, their heirs & assigns, to be holden of his Majtie, as of the Mannor of East Greenwich in free & common soccage.

By the common law of England, which is what the Charter has a view to, it is undoubted that real estates descend to the eldest son of him that was last seized in fee as his heir at law, and neither an admr or an Ecctial Court have any thing to do therewith, and by the law of England an only daughter cannot be coheir with an only son, but the son is absolute and sole heir to the father, and must as such inherit his real estate undevised by will, and we take it that where an estate of inheritance is granted under the Great Seal of Great Brittain, which this Charter does, that the same is descendible according to the course of the comon law, and we also take it that all our Plantations carry with them the comon law of their mother country, which prevails in all the Plantations, . . . We therefore insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenour of their Charter, and consequently the Province had no power to make such a law and the same is void.

Note. The laws of Connecticut are not by their Charter directed to be laid before the Crown for their approbacon or disallowance, so that there is no other way to avoid any laws they shall make but by seeing if they are agreeable to the powers of their Charter, which if they are not, then we apprehend they cannot be considered as any laws at all, since a formal repeal of them cannot be had otherwise than by voiding the Charter. . . .

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[1] The statement of the case is, with slight omissions, taken from *Connecticut Historical Society Collections,* Vol. IV, *note,* pp. 94-95.—Editor.

[2] Winthrop was well advised in the choice of his attorneys, for his senior counsel was none other than Sir Philip Yorke, then Attorney-General, later Chief Justice of the Court of King's Bench and finally Lord High Chancellor, one of the most distinguished common law and equity judges which the English-speaking peoples have produced. The junior, if junior he can be called, was the hardly less distinguished Charles Talbot, then Solicitor-General, and Lord High Chancellor immediately preceding his senior counsel Yorke.—Editor.

[3] The word "not" was accidentally omitted by the solicitor who prepared this argument, or by his clerk, and curiously enough the omission apparently escaped the notice of the counsel who made the marginal notes.

What we are to pray is.

First, That the resolve of the General Assembly declaring Lechmere might and ought to be releived by the Court of Probates may be declared null and void.

Secondly, That the inventory tendered by us to the Court of Probates of all our father's psonal estate may be declared a right and proper inventory, and ought to be accepted as such, and that the sentences rejecting the same may be reversed.

Thirdly, That the sentence of the Superior Court granting admrcon to Mr. Lechmere & his wife may be reversed and set aside, and Lechmere's action demanding the same be dismissed.

Fourthly, That the admrcon granted to Lechmere may be called in and vacated, and the admrcon before granted to the appellant ordered to stand.

Fifthly, That the inventory exhibited by Mr. Lechmere and his wife of the appellant's real estate, and also of his charges, and the debt due to Lattemore, may be vacated and taken off the fyle, and the order allowing the same and directing the same to be recorded may be discharged.

Sixthly, That the order of the General Assembly impowering the said Lechmere to sell the appellant's lands, and the order of the Superior Court founded thereon, dated 27 September, 1726, allowing of Lechmere's making such sale, and the sale itself, may be declared null and void, and expurged the record; and generally

Seventhly, That all which Mr. Lechmere hath done under the said admrcon, together with the said law for settleing intestate's estates may be declared void, and that the appellant is intitled to succeed to the real estate of his father as heir at law, according to the common law of the land. . . .[1]

Willes[2] for respondent. On the merits it is admitted that the sentence of the Connecticut court is contrary to the law of England, in that the law of the colony passes two-thirds to the eldest son and one-third to the younger children.

In reply to contention that the law was never put into use and obsolete, counsel for respondent are not prepared with instances to the contrary.[3] It had, however, been the custom of Massachusetts and the custom of Connecticut, and the act of 1699 giving it effect was in fact declaratory of this custom.[4]

In reply to the contention of counsel for appellant that the charter did not grant power to make such laws, it is admitted that the first part of the charter is general, but it is contended that the last words give them power to make all laws whatsoever, and how can the inhabitants of the colony be peaceably governed without laws relating to property? The case is not like that of a corporation established in England, which would be bound by the laws here passed. The restriction in the charter that laws are not to be made by the colony repugnant to the laws of England does not mean that the colony may not make laws for cases unprovided for, but that they are not to repeal the laws of England where

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[1] *Massachusetts Historical Collections,* 6th series, Vol. V, pp. 485–493.—Editor.

[2] Willes is said by the editors of the *Massachusetts Historical Collections* probably to be Sir John Willes, shortly thereafter Attorney-General and subsequently Chief Justice of the Court of Common Pleas.—Editor.

[3] Mr. Ferdinand John Paris, reputed to be "perhaps the most efficient of the lawyers who were frequently employed by the colonies" said, in a letter dated July 26, 1738, to Jeremiah Allen, that the attorneys for Winthrop "boldly put it upon Mr. Lechmere's counsel to shew that that distributary act had ever, once, been followed or carried into Execution in Connecticut; & they were so very poorly instructed that they did not in Return, offer to shew that it had." (*Connecticut Historical Society Collections,* Vol. V, p. 78.)—Editor.

[4] On this point see Professor C. M. Andrew's "Connecticut Intestacy Law," *Yale Law Review* for 1894, Vol. III, pp. 261–294, reprinted in *Anglo-American Legal Essays,* Vol. I, pp. 431–463.—Editor.

the plantations are mentioned. If this restriction be extended to laws varying from the laws of England, they can then make none.

Booth, for respondent, called attention to the cases in which lands are descendable according to the laws of England and to the cases in which it is in the power of the Assembly to vary descent.

Counsel instances two cases, the first apparently of an uninhabited country taken possession of by England, and the second that of an inhabited country conquered and made a colony of the Crown. The case of Blankard v. Galdy (4 Mod. 222), decided in 1693 by Lord Chief Justice Holt, was referred to by counsel as in point, to the effect that the laws of England are in force "in case of an uninhabited country newly found by English subjects," but that, in the case of a conquered country, "the laws of England did not take place there until declared so by the conqueror or his successors," and that, in any event, the law of England does not extend to a colony unless by a particular act of Parliament.

In the case of Connecticut, the charter gives the power to purchase lands and to alienate them, and if private individuals may dispose of their lands, why may not the colony dispose of the whole? And the clause of the charter not to make laws contrary to English law, applies to public matters, trade, etc.[1]

In obedience to an Order in Council of the 13th of May last referring to this committee [for hearing appeals from the plantations] the humble petition and appeal of John Winthrop . . . their hardships this day [December 20, 1726] took the said petition into consideration. . . .

Their Lordships having heard all parties concerned, by their counsel learned in the law, on the said petition and appeal, and there being laid before their lordships an act passed by the Governor and Company of that Colony, entituled An Act for the Settlement of Intestate Estates, by which act (amongst other things) administrators of persons dying intestate are directed to inventory all the estate, whatsoever, of the persons so deceased, as well moveable as not moveable, and to deliver the same upon oath to the court of probates; and by the said act (debts, funerals and just expences of all sorts, and the dower of the wife, if any, being first allowed) the said court of probates is empowered to distribute all the remaining estate of any such intestate, as well real as personal, by equal portions, to and amongst the children and such as legally represent them, except the eldest son who is to have two shares or a double portion of the whole; the division of the estate to be made by three sufficient freeholders, on oath, or any two of them, to be appointed by the court of probates. Their Lordships, upon due consideration of the whole matter, do agree humbly to report as their opinion to your Majesty, that the said act for the settlement of intestate estates should be declared null and void, being contrary to the laws of England, in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the charter of that Colony; and that the said three sentences of the 29th of June, 1725, of the 28th of September, 1725, and of the 22d day of March, 1725–6, rejecting the inventory of the said intestate's estates exhibited by the petitioner, and refusing to accept the same, because it did not contain the real as well as personal estate of the said intestate, and declaring real as well as personal estates ought to be inventoried, may be all reversed and set aside; . . .

[1] This statement of the argument of counsel for respondent is enlarged from the very meagre notes made apparently by either Yorke or Talbot, counsel for Winthrop, upon the margin of their brief. See note to *Massachusetts Historical Society Collections,* 6th series, Vol. V, p. 440.—Editor.

His Majesty, taking the same into his royal consideration, is pleased, with the advice of his Privy Council, to approve of the said report, and confirm the same in every particular part thereof; and pursuant thereunto, to declare, that the aforementioned act, entituled An Act for the settlement of intestate estates, is Null and Void; and the same is hereby accordingly declared to be null and void, and of no force or effect whatever. And his Majesty is hereby further pleased to order, that all the aforementioned sentences of the 29th June, 1725, of the 28th of September, 1725, and of the 22d March, 1725–6, and every of them, be and they are hereby reversed and set aside; and that the petitioner, John Winthrop, be, and he is hereby, admitted to exhibit an inventory of the personal estate only of the said intestate, and that the court of probates do not presume to reject such inventory because it does not contain the real estate of the said intestate. And his Majesty doth hereby further order, that the aforementioned sentence of the 22d of March, 1725–6, vacating the said letters of administration granted to the petitioner, and granting administration to the said Thomas and Ann Lechmere, be also reversed and set aside; and that the said letters of administration, so granted to Thomas Lechmere and Anne his wife, be called in and vacated; and that the said inventory of the said real estate, exhibited by the said Thomas Lechmere and Ann his wife, be vacated; and that the said order of the 29th of April, 1726, approving of the said inventory and ordering the same to be recorded, be discharged and set aside; and that the original letters of administration granted to the petitioner be, and they are hereby, established and ordered to stand; and that all such costs as the petitioner hath paid unto the said Thomas Lechmere by directions of the said sentences, all, every, or any of them, be forthwith repaid to him by the said Thomas Lechmere; and that the suit brought by the said Thomas Lechmere and Anne his wife, on which the said sentences were made, be and they are hereby dismissed; and that all acts and proceedings done and had under the said sentences, all, every, or any of them, or by virtue or pretence thereof, be and they are hereby discharged and set aside, and declared null and void. And his Majesty is further pleased to declare, that the aforementioned act of Assembly, passed in May, 1726, empowering the said Thomas Lechmere to sell the said lands, is null and void; and also that the said order made by the said superior court, bearing date the 27th of September, 1726, pursuant to the said act of Assembly, allowing the said Lechmere to sell of the said real estate to the value of ninety pounds current money there for his charges, and three hundred and eighteen pounds silver money, is likewise null and void; and the said act of Assembly and order of the said superior court are accordingly hereby declared null and void, and of no force or effect whatever.

And his Majesty doth hereby likewise further order, that the petitioner be immediately restored and put into the full, peaceable and quiet possession of all such parts of the said real estate as may have been taken from him, under pretence of, or by virtue or colour of the said sentence, orders, acts and proceedings, or any of them; and that the said Thomas Lechmere do account for and pay to the said petitioner the rents and profits thereof, and of every part thereof, received by him or any one under him, for and during the time of such his unjust detention thereof.

And the Governour and Company of his Majesty's Colony of Connecticut

for the time being, and all other officers and persons whatsoever, whom it may concern, are to take notice of his Majesty's royal pleasure hereby signified, and yield due obedience to every particular part thereof, as they will answer the contrary at their peril.[1]

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[1] In accordance with the decree of His Majesty in Council, the General Assembly of Connecticut, in its October session of 1728, made provision for the restoration to Winthrop of the lands of which he had been dispossessed. (*Connecticut Colonial Records,* Vol. VII, p. 217.)

The attitude of the colony toward the decree and the means taken to circumvent it are thus stated by the accomplished editor of Volume VII of the *Connecticut Colonial Records,* in a letter dated September 18, 1873, addressed to the Honorable Robert C. Winthrop, President of the Massachusetts Historical Society:

"The decree in Winthrop *vs.* Lechmere, on which Phillips relied, is printed in the seventh volume of the Colonial Records of Connecticut, p. 571. It is said that Mr. Lechmere failed in his defence for want of 'a good sword formed of the royal oar,' or its application; and that the counsel employed by him were not accustomed to business of this kind.

"After the decision in Winthrop *vs.* Lechmere, as the colony of Connecticut had not been heard in the matter, it seems that intestate estates continued to be settled in the accustomed manner, the sentence of nullity of the colonial law notwithstanding; and, if appeals were made from the Probate to the Superior Court, they were continued from term to term." (*Massachusetts Historical Society Proceedings,* Vol. 13, p. 100.)

The Connecticut act in question was based upon an act of Massachusetts of 1692. In the case of *Phillips* v. *Savage,* the elder brother of Henry C. Phillips, intestate, claimed the real estate which, according to the Massachusetts act, should be divided between the brothers and the sisters of the deceased. From a decision of the Court of Probate and the Governor and Council in 1733, ordering the estate to be divided "pursuant to their laws," a petition of appeal to his Majesty in Council was allowed in 1734, and the year thereafter referred to the committee for hearing appeals from the plantations, where it lay unacted upon until 1737, in order that Lord Chancellor Hardwicke, who as Sir Philip Yorke had appeared as counsel for Winthrop, could attend the hearings. Mr. Ferdinand John Paris, counsel for Mrs. Savage, thus relates the subsequent proceedings:

"That Appeal came on to be heard before the Committee of Council.

"And the Appeal was reduced to that single & great Point, whether the Massachusetts Law, distributing Intestates real Estates, was a valid Law, or not?

"Mrs. Savage the respondent, (for whom I was concerned), shewed those old Laws of the Massachusetts, made under their Old Charter,—the new Laws under the New Charter—the actual Approbation of the Crown of some of those New Laws, and the not Disapprobation of all of them.

"And She also shewed, in the only proper manner, vizt, *under the Seal of the Colony,* the Certificates from the proper Officers of the Usage & Practice under those Laws.

"And insisted on the Utility, Convenience and Fitness of those Laws to an Infant Country.

"On the other hand, Mr. Phillips, the Appellant, relyed on the Determination made in Winthrop's Case from Connecticut in 1727.

"This made it necessary to shew the Distinctions between the two Cases.

"The Massachusetts Law had been approved.

"The Connecticut Law not so.

"The Massachusetts Charter gave Power *generally* to make Laws.

"The Connecticut Charter had a Reservation in one Place, according to the Course of other Corporations in England.

"It appeared in the Massachusetts Case that their Law was very Ancient.

"The Date of the Connecticut Law did not appear.

"It appeared that the Massachusetts Law was daily, constantly and continually observed, and carried into Execution.

"And, after all these Distinctions had been taken, what very greatly assisted Mrs. Savage's Cause was, a Declaration made, by the present Lord Chancellor Hardwicke, to this Effect, vizt.

"That he had been of Council for Mr. Winthrop in his Case formerly. That as his Council, he had at such time, offered all that he could for his Clyent, to get the Connecticut Act repealed and the Orders reversed. That thô he had prevailed therein for his Clyent, Yet, with very great Deference to those Lords who judged in that Case, he was not satisfied in his own private Opinion, with that determination in Winthrop's Case.

"Hereupon the Law in Massachusetts was adjudged good, and in Consequence thereof

Holmes v. Walton.

Supreme Court of New Jersey, 1780.

[4 *American Historical Review,* 456][1]

An act of the legislature of the State of New Jersey of October 8, 1778, requiring a special jury of six men instead of the common-law jury of twelve, is null and void, being inconsistent with Section XXII of the Constitution of New Jersey adopted July 2, 1776, providing "that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal forever."

On October 8, 1778, the Legislature of New Jersey passed a law to prevent intercourse with the enemy, as the British troops were then in possession of Staten Island adjacent to New Jersey, making it "lawful for any person or persons whomsoever to seize and secure provisions, goods, wares and merchandize attempted to be carried or conveyed into or brought from within the lines or encampments or any place in the possession of the subjects or troops of the King of Great Britain," and providing that the goods and persons in whose possession they might be found were to be taken before a Justice of the Peace of the county; that, upon the demand of either party, a jury of six men should be granted, according to the law of February 11, 1775; "that in every cause where a jury

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the Orders for dividing Philips's Estate, (which had been appealed against), were affirmed, and the Appeal dismist." (Letter of Ferdinand John Paris to Jeremiah Allen, Treasurer of the Province of Massachusetts, dated London, July 26, 1738, *Connecticut Historical Society Collections,* Vol. V, pp. 80–81.)

For the case of *Phillips* v. *Savage* and the text of the judgment rendered by the Privy Council, February 15, 1738, see *Acts of the Privy Council, Colonial Series,* 1720–1745, Vol. III, pp. 432–436; *Massachusetts Historical Society Proceedings,* 1860–62, pp. 64–80, 165–171.

The Colony of Connecticut was anxious, in behalf of the Colony and its inhabitants, to secure the reversal of *Winthrop* v. *Lechmere,* and, encouraged by the case of *Phillips* v. *Savage* (although the cases were clearly distinguishable), aided and abetted one Tousey in the case of Clarke v. Tousey, then on appeal before the Privy Council, in which Clarke as appellant claimed the real estate of his intestate father according to the common law of England against Tousey, relying upon the Connecticut act of 1699 and the decisions of Connecticut courts in his favor. Clarke's appeal was dismissed by the Privy Council in 1745, apparently on the technical ground that it was not brought within the year and day allowed for an appeal, which dismissal the Colony affected to consider as a reversal of *Winthrop* v. *Lechmere* and a reinstatement of the law of 1699; although it was not so in fact, as pointed out by Professor Charles McLean Andrews in the following passage from his interesting and instructive article on "The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law," (3 *Yale Law Review,* 261–294, reprinted in *Select Essays* in *Anglo-American Legal History,* Vol. I, pp. 431–463):

"The appeal was dismissed, however, by the Privy Council in 1745, not through any decision as to the right or wrong of the case, but because of the fact that Clark had not prosecuted the appeal within a year and a day as required by the Council. Connecticut accepted the dismissal as a decision in her favor, although it was in fact nothing of the kind. It ended the matter only because no one dared to make another appeal and the question never came up again."

For the case of *Clarke* v. *Tousey,* decided by the Privy Council, July 18, 1745, see *Connecticut Colonial Records,* Vol. IX, pp. 587–593; *Acts of the Privy Council, Colonial Series,* 1720–1745, Vol. III, pp. 580–81.—Editor.

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[1] The report of this case, considered to be the first in which an act of an American legislature was set aside by a court of justice as contrary to the law of the land, is, together with the footnotes, taken from an article entitled "Holmes *v.* Walton: The New Jersey Precedent," contributed by Austin Scott, Professor of History and Political Science in Rutgers College, to the *American Historical Review* for April, 1899, pp. 456, *et seq.*—Editor.

of six men give a verdict as aforesaid there shall be no appeal allowed;" and that, in case of a verdict for plaintiff, the proceeds from the sale of the goods were to be divided among the persons seizing them.

By virtue of this law, Elisha Walton, a major of militia, seized a quantity of goods in the possession of John Holmes and Solomon Ketcham, whom he charged with having brought them from within the lines of the enemy. The case was tried before a Justice of the Peace of Monmouth County on May 24, 1779, with a jury of six men, who brought in a verdict in favor of Walton, and judgment was given accordingly.

Willcocks, for the plaintiffs in *certiorari,* argued that the judgment of the Justice of the Peace should be reversed:

Because the jury sworn to try the above cause and on whose verdict judgment was entered, consisted of twelve [six] men only, when by the Laws of the Land it should have consisted of twelve men.

For that the said justice had not jurisdiction of the said cause or plaint but the same was *coram non judice.*

For that the jury who tried the said plaint before the said justice consisted of six men only contrary to law.

For that the jury who tried the said plaint before the said justice consisted of six men only contrary to the constitution of New Jersey.

For that the proceedings and trial in the said plaint in the court below, and the judgment thereon given were had and given contrary to the constitution,[1] practices and laws of the land.[2]

On September 7, 1780, ten months after the case had been argued, and in the presence of a full bench consisting of David Brearly,[3] Chief Justice, with Isaac Smith and John Cleves Symmes, Associate Justices, judgment was entered according to the following minute:

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[1] Section XXII, of the constitution of New Jersey, adopted July 2, 1776, reads as follows: "That the common law of England, as well as so much of the statute law as have been heretofore practiced in this colony shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this Charter; and that the inestimable rights of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." The final section of the same constitution prescribes as a part of the oath to be taken by each member of the legislature, that he will not assent to any law, vote, or proceedings to repeal or annul "that part of the twenty-second section respecting the trial by jury."

[2] In addition to immemorial custom, the "common law" of England, which may have been held to have had validity in this case, two documents may have been appealed to as fundamentally relevant and as constituting in New Jersey a part of the "law of the land": the first, Chapter XXII, of the West Jersey "Concessions and Agreements" of 1676, "Not to be altered by the legislative authority," which begins thus, "That the trial of all causes, civil and criminal, shall be heard and decided by the verdict or judgment of twelve honest men of the neighborhood." The second was a formal declaration of the "Rights and Privileges" passed by the House of Representatives in East Jersey on March 13, 1699, and accepted by the governor and council, which asserted that "all trials shall be by the verdict of twelve men." Other acts of the assembly in each of the two Jersey provinces before their union in 1702, show that the right to a trial before a jury of twelve men was regarded as fundamental; notably the act of November, 1681, in West Jersey, and that of March, 1683, in East Jersey.

[3] It is to be observed that David Brearly, who took part in the decision of this case as Chief Justice, was a member of the Constitutional Convention of 1787; that William Livingston, then Governor of the State, was likewise a member of the Convention, as was also the then Attorney-General, William Paterson, who, as delegate to the Convention, introduced the so-called New Jersey plan, of which the 6th resolution, forming the basis of Article 6, clause 2 of the Constitution as eventually adopted, provided that "all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the Articles of Confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or

"This cause having been argued several terms past and the court having taken time to consider the same, and being now ready to deliver their opinion gave the same seriatim for the plaintiffs in *certiorari.* And on motion of Boudinot for the plaintiffs, judgment is ordered for the plaintiffs, and that the judgment of the justice in the court below be reversed and the said plaintiffs be restored to all things, etc."

Trevett v. Weeden.

Superior Court of Judicature of Rhode Island, 1786.

[Coxe, *Judicial Power and Unconstitutional Legislation,* 234.]

An act of the legislature of Rhode Island, providing for a trial in a criminal case without a jury, is contrary to the laws of the land and is liable to be set aside as unconstitutional by the courts of the State in a judicial proceeding.

The general assembly of Rhode Island, by an act of May session, 1786, provided for the emission of certain paper money. By an act of June session, 1786, the same body enacted that any person who should refuse to receive the said paper money in exchange for goods on sale at the value of the face of the bills, or who should make two prices for such goods, one in paper and the other in silver, etc., should upon conviction thereof be fined one hundred pounds for the first offence, and for the second be fined the same amount and become incapable of electing, or being elected, to any office of honour.

By act of special August session, 1786, the assembly provided for offences against the previous act being tried by special courts, each of which should proceed in the following way: "that the said court, when so convened, shall proceed to the trial of said offender; and they are hereby authorized
*235 * so to do, *without any jury,* by a majority of the judges present, *according to the laws of the land,* and to make adjudication and determination; and that three members be sufficient to constitute a court."[1] It was further enacted that there should be no appeal from the judgment of the court, etc.

The cause of Trevett *v.* Weeden was a *qui tam* action "brought by John Trevett, informer, against John Weeden, butcher, for refusing to take, of the said John Trevett, for meat, the bills of credit emitted by an act of the general assembly of said state."[2]

To the plaintiff's complaint the defendant made answer by the following plea:

Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decision, any thing in the respective laws of the Individual States to the Contrary notwithstanding." (Madison's *Debates of the Constitutional Convention,* Hunt's ed., Vol. I, pp. 141–142; Farrand, *Records of the Federal Convention,* Vol. I, p. 245.)—Editor.

[1] Varnum, ["The case of *Trevett* against *Weeden:* on Information and Complaint, for Refusing Paper Bills in Payment for Butcher's Meat in Market at par with Specie." (Providence, printed by John Carter, 1786),] p. 59.

[2] Providence Gazette, October 7th, 1786; American Museum, Vol. V, p. 36.

"The said John Weeden comes into court and prays the honourable court here will not take cognizance of the complaint of the said John Trevett; because he saith, that it appears by the act of the general assembly, whereon said information is founded, that the said act hath expired, and hath no force: Also, for that by the said act the matters of complaint are made triable before special courts, incontrollable by the supreme judiciary court of the state: And also, for that the court is not authorized or empowered by said act, to impanel a jury to try the facts charged in the information, *and so the same is unconstitutional and void:* All which the said Weeden is ready to verify. Wherefore he prays judgment of the court here, *that they will not take further cognizance of the said information.*" . . .[1]

Channing, Attorney-General, for the plaintiff.

Varnum[2] and *Merchant,* for the defendant.

In the course of his argument, Varnum sought to show:

*236 * (1) That the act, upon which the information was founded, had expired;

(2) That, by the act, special jurisdictions were created, uncontrollable by the supreme or superior court of judicature;[3]

(3) That, by the act, the court was not authorized or empowered to impanel a jury to try the facts contained in the information;[4]

(4) That the trial by jury was a fundamental constitutional right, was a part of the legal constitution of Rhode Island, had always been claimed as such, had always been ratified as such, and had always been held most dear and sacred;[5]

(5) That the legislature derived all its authority from the constitution, that it had no power of making laws but in subordination to the constitution and that therefore it could not infringe or violate the constitution, as was done by enacting an act depriving citizens of the constitutional right of trial by jury;[6]

(6) "That therefore the act is unconstitutional and void;[7]

(7) "That this court has power to judge and determine what acts of the general assembly are agreeable to the constitution;[8]

(8) "That this court is under the solemn obligations to execute the laws of the land, and therefore can not, will not consider this act as a law of the land."[9] . . .

*241 * "As the legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people? I answer, their supremacy (consisting in the power of making laws, agreeable to their appointment) is derived from the constitution, is subordinate to it, and therefore, whenever they attempt to enslave the people, and carry their attempts into execution, the people themselves will judge, as the only resort in the last stages of oppression. But when they proceed no farther than merely to enact

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[1] Gazette as cited: Museum as cited; Varnum, p. 2.

[2] James M. Varnum (1748–1789), counsel for the plaintiff, and by whose report the proceedings of the case are principally known, was a leader of the bar of the State of Rhode Island; a distinguished soldier of the Continental Army, in which he held the rank of Brigadier General; Major General of the State of Rhode Island; a member of the Continental Congress (1780–82, 1786–87) at the time of the trial of the case, which he appears to have called to the attention of the lawyers and leaders of opinion of his day, and because of this, as well as of his personal distinction, to have made it better known than it would otherwise have been.—Editor.

[3] Varnum, p. 35, 7.

[4] Ib., 10.

[5] Ib., 11.

[6] Ib., 20, *et seq.*

[7] Ib.

[8] Ib.

[9] Ib.

what they may call laws, and refer those to the judiciary courts for determination, then, (in the discharge of the great trust reposed in them, and to prevent the horrors of civil war, as in the present case,) the judges can, and we trust Your Honors will, decide upon them."[1] . . .

*242 * "The true distinction lies in this, that the legislative have the uncontrollable power of making laws not repugnant to the constitution. The judiciary have the sole power of judging those laws, and are bound to execute them; but cannot admit any act of the legislative as law, which is against the constitution."[2] . . .

Laws made by the general assembly under the powers derived from the constitution "become the laws of the land and as such the court is sworn to execute them. But if the general assembly attempt to make laws contrary here-

*243 unto, the court can not receive them." If the judges should do so, * they would violate both their oaths. "There is no middle line. The legislative hath power to go all lengths, or not to overleap the bounds of its appointment at all. So it is with the judiciary; it must reject all acts of the legislative that are contrary to the trust reposed in them by the people, or it must adopt all."[3] . . .

*245 * The following constitutes the whole of the brief extant report: "The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sensible and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court—declared himself independent as a judge—the penal law

*246 to be repugnant[4] and unconstitutional—and * therefore gave it as his opinion that the court could not take cognizance of the information! Judge Devol was of the same opinion. Judge Tillinghast took notice of the striking repugnacy of the expressions of the act, 'Without trial by jury, according to the laws of the land'—and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court[5] without giving his own opinion." . . .[6]

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[1] Varnum, p. 26. [2] Ib., p. 26. [3] Id., pp. 29, 28. [4] "Unjust," in the Museum's text.

[5] The words, "against the informer," are here found in the Museum's text.

[6] The General Assembly was incensed at this action in declaring unconstitutional an act of the Legislature contrary to the constitution and the law of the land. The judges were ordered to appear before the Legislature and to justify their conduct. This they did, and with such effect that they were not removed from their posts, as the Legislature apparently had determined to do, but their independence nevertheless caused them the loss of their positions, as, elected annually, their terms expired the next spring and other persons were chosen to succeed them.

It is to be observed that the case of *Trevett* v. *Weeden* was decided September 25, 1786, a year preceding the Constitutional Convention; that the judges, because of their independence, failed of reëlection in the spring of 1787, on the eve of the Convention. General Varnum's pamphlet, giving the proceedings in the case of *Trevett* v. *Weeden,* in which he was leading counsel for defendant, was published in Providence in 1787, was widely circulated, and the case was specifically alluded to by Madison on the floor of the Convention in the course of his remarks on July 17, 1787: "Confidence can not be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures. In R. Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be the willing instruments of the wicked & arbitrary plans of their masters." (Madison's *Debates of the Constitutional Convention,* Hunt's ed., Vol. 1, p. 373; Farrand, *Records of the Federal Convention,* Vol. II, p. 27.)

For the view that the case of *Trevett* v. *Weeden* was dismissed for lack of jurisdiction, not because the act of the legislature was unconstitutional, see I. B. Richman, *Rhode Island,* American Commonwealth Series, 1905, p. 80, note 1, p. 81.—Editor.

Den, on the demise of Bayard & Wife v. Singleton.

Court of Conference of the State of North Carolina, 1787.

[1 *Martin, N. C.* 48.]

Citizens of one of the United States are citizens of the State of North Carolina by the fourth of the Articles of Confederation of all the States, which is to be taken as a part of the law of the land, unrepealable by act of the General Assembly of North Carolina.

By the constitution of North Carolina every citizen has a right to a decision in regard to his property by a trial by jury. The act of Assembly therefore of 1785 requiring the Court to dismiss on motion, the suits brought by persons, whose property had been confiscated, against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void.

EJECTMENT. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of *Newbern.*

The defendant pleaded *not guilty,* under the common rule.

He held under a title derived from the state, by a deed, from a Superintendant Commissioner of confiscated estates.

At *May* term, 1786, *Nash* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled, *an act, to secure and quiet in their possession all such persons, their heirs, and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose,* 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our constitution and system of government.

Ashe, J., observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution,—dividing the powers of government into separate and distinct branches, *to wit:* the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries; this he said without disclosing a single sentiment upon the cause of the proceding, or the law introduced in support of it.

Curia Advisare Vult.

*49 * At *May* term, 1787, *Nash's* motion was resumed, and produced a very lengthy debate from the bar.

Whereupon the COURT recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The court then, after every reasonable endeavour had been used in vain for avoiding a disagreeable difference between the Legislature and the judicial powers of the state, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the state, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the courts of this state; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, are citizens of this state, by the confederation of all the states; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this,

*50 they might without equal authority, not only render * themselves the Legislators of the state for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same

instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.[1]

Van Horne's Lessee v. Dorrance.

United States Circuit Court for the District of Pennsylvania, 1795.

[2 *Dallas*, 304.]

The constitution is paramount to the power of the legislature; and every statute repugnant to it, is absolutely void.

The judiciary is a co-ordinate branch of the government, and may declare a statute to be void, as repugnant to the constitution.

An act of a state legislature, divesting one person of his property, and vesting it in another, at a fixed compensation, is unconstitutional and void. . . .

This was a cause of great expectation, involving several important questions of constitutional law, in relation to the territorial controversy between the States of *Pennsylvania* and *Connecticut*. After a trial, which continued for fifteen days, the presiding Judge delivered the following charge to the Jury, comprising a full review of all the important facts and principles that had occurred during the discussion.

PATERSON, *Justice*. Having arrived at the last stage of this long and interesting cause, it now becomes the duty of the Court to sum up the evidence, and to

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[1] Upon the overruling of Nash's motion, the cause was tried upon its merits, verdict found for the defendants, and the unanimous judgment of the court entered in accordance with the verdict. It is stated by Mr. Justice Spencer, who participated in and reported the case, that "on the decision of this cause, twenty-seven others depending in the same court, and subsisting upon similar, or less substantial grounds, were all swept off the docket by nonsuits voluntarily suffered."

It is important to note that the phase of *Bayard* v. *Singleton*, concerning the unconstitutionality of the act of the General Assembly was decided in the May term of the court, during the session of the Constitutional Convention held in Philadelphia, in 1787; that William R. Davie, counsel for the plaintiff, was a delegate to that Convention; that Richard Dobbs Spaight, likewise a delegate from North Carolina, was bitterly opposed to the decision, and under date of August 12, 1787, wrote from Philadelphia a letter to Iredell (counsel with Davie in the case and later a Justice of the Supreme Court of the United States), criticising the decision, to which Iredell replied in a masterly vindication of the dignity of the court in a letter of August 26, 1787, addressed to Spaight in Philadelphia, where he was in attendance upon the Convention. For an earlier expression of Mr. Justice Iredell's views, see his "Letter of an Elector," printed at Newbern, August 17, 1786, where the principal case was tried. (McRee, *Life and Correspondence of James Iredell*, Volume II, pp. 145–149; Coxe, *Judicial Power and Unconstitutional Legislation*, pp. 253–258). For Mr. Spaight's letter to Iredell, from the Convention, dated August 12, 1787, see McRee, Volume II, pp. 168–170; Coxe, pp. 385–386. For Iredell's reply, see McRee, Volume II, pp. 172–176; Coxe, pp. 259–263.

In view of all the circumstances of this case, it is to be presumed that it was brought to the attention of the members of the Constitutional Convention.—Editor.

declare the law arising upon it. A mass of testimony has been brought forward in the course of the trial, the far greater part of which is altogether immaterial, and can be of no use in forming a decision. The great points, on which the cause turns, are of a legal nature; they are questions of law; and, therefore, for the sake of the parties, as well as for my own sake, they ought to be put in a train for ultimate adjudication by the Supreme Court. In the administration of justice it is a consolatory idea, that no opinion of a single judge can be final and decisive; but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified. For the sake of clearness, I shall consider,

1st. The title of the plaintiff.

2d. The title of the defendant. . . .

*305 * Such is the title upon which the plaintiff rests his cause. It is clearly deduced and legally correct; and, therefore, unless sufficient appears on the part of the defendant, will entitle the plaintiff to your verdict. To repel the plaintiff's right, and to establish his own, the defendant sets up a title:

1st. Under *Connecticut.*

2d. Under the *Indians.*

3d. Under *Pennsylvania.*

I. *Under Connecticut.* The title under *Connecticut* is of no avail: Because the land in controversy is ex-territorial; it does not lie within the charter bounds of *Connecticut,* but within the charter-bounds of *Pennsylvania.* The charter of *Connecticut* does not cover or spread over the lands in question: Of course, no title can be derived from *Connecticut.* Here then the defendant fails.

II. *Under the Indians.* . . .

*306 * The land in controversy, being within the limits of *Pennsylvania,* the *Connecticut* settlers were, in legal estimation, trespassers and intruders. They purchased the land without leave, and entered upon it without right.

They purchased and entered upon the land without the consent of the Legislature of *Connecticut.* True it is, that the Legislature of *Connecticut* gave a subsequent approbation, but this was posterior to the deed executed by the *Six Nations* to *Penn,* at fort *Stanwix,* and the principle of relation does not retrospect so as to affect third persons.

The consequence is, that the *Connecticut* settlers derive no title under the *Indian* deed.

*307 * III. *The title which the defendant sets up under Pennsylvania.* This is the keystone of the defendant's title, as one of his counsel very properly expressed it. It required no great sagacity to perceive, that the defendant's hope of success was founded on a law of *Pennsylvania,* commonly called "the quieting and confirming act." This act, and the two subsequent ones of a suspending and a repealing nature, upon an extensive and important field for discussion. In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts. To form a correct judgment, legal principles must be taken up and applied, and when this is done in a proper manner, it gives stability to judicial decisions, and security to civil rights. Hence uniformity and certainty; hence the decisions of tomorrow will be like the decisions of to-day; they will run in the same line, because they are founded on the same principles. To aid you, Gentlemen, in forming a verdict, I shall consider:

I. The constitutionality of the confirming act; or, in other words, whether the Legislature had authority to make that act?

Legislation is the exercise of sovereign authority. High and important powers are necessarily vested in the Legislative body; whose acts, under some forms of government, are irresistible and subject to no controul. In *England*, from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent and has no bounds.

"The power and jurisdiction of Parliament, says *Sir Edward Coke*, is so transcendant and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, *si antiquitatem spectes, est vetussissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.* It has sovereign and uncontroulable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: This being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of *Henry* VIII. and *William* III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king *Henry* VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves; as was done by the act of union, and the several statutes for tri-
*308 ennial and septennial elections. It can, in * short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo." (1 *Bl. Com.* 160.)

From this passage it is evident, that, in *England*, the authority of the Parliament runs without limits, and rises above controul. It is difficult to say what the constitution of *England* is; because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament: It bends to every governmental exigency; it varies and is blown about by every breeze of legislative humour or political caprice. Some of the judges in *England* have had the boldness to assert, that an act of Parliament, made against natural equity, is void; but this opinion contravenes the general position, that the validity of an act of Parliament cannot be drawn into question by the judicial department: It cannot be disputed, and must be obeyed. The power of Parliament is absolute and transcendant; it is omnipotent in the scale of political existence. Besides, in *England* there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In *America* the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from

the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve Whatever may be the case in other countries, yet, in this, there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.

*309 * In the second article of the declaration of rights, which was made part of the late constitution of Pennsylvania, it is declared: "That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be, compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be, vested in, or assumed, by any power whatever, that shall, in any case, interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." (Dec. of Rights, Art. II.)

In the thirty-second section of the same constitution, it is ordained; "that all elections, whether by the people or in general assembly, shall be by ballot, free and voluntary." (Const. Penn. § 32.)

Could the Legislature have annulled these articles, respecting religion, the rights of conscience, and elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. If the Legislature had passed an act declaring, that, in future, there should be no trial by Jury, would it have been obligatory? No: It would have been void for want of jurisdiction, or constitutional extent of power. The right of trial by Jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away. The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both Legislators and Judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of,

that the Judiciary in this country is not a subordinate, but co-ordinate, branch of the government.

*310 * Having made these preliminary observations, we shall proceed to contemplate the quieting and confirming act, and to bring its validity to the test of the Constitution.

In the course of argument, the counsel on both sides relied upon certain parts of the late Bill of Rights and Constitution of *Pennsylvania,* which I shall now read, and then refer to them occasionally in the sequel of the charge. . . .

The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.

The next step in the line of progression is, whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation. . . .

*311 * The constitution [of Pennsylvania] expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and inalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. It is sacred; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of, the constitution.

The constitution is the origin and measure of legislative authority. It says *312 to legislators, thus far ye shall go and no further. . . . * Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest it in another? The rights of private property are regulated, protected, and governed by general, known, and established laws; and decided upon, by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence are equal and universal; they press alike on all. Hence, security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legislature. It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous, and enormous a power as that which has been exercised on the present occasion; a power that, according to the full extent of the argument, is boundless and omnipotent: For the legislature judged of the necessity of the case, and also of the nature and value of the equivalent. . . .

But admitting, that the Legislature can take the real estate of A, and give it to B. on making compensation, the principle and reasoning upon it go no further than to shew, that the Legislature are the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the Constitution, be extended beyond the point of judging upon every existing case of necessity. The Legislature declare and enact, that such are the public exigencies, or necessities of the State, as to authorise them to take the land of A, and give it to B.; the dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract, and the Constitution, direct, and they accordingly declare and ordain, that

A. shall receive compensation for the land. But here the Legislature must stop; they have run the full length of their authority, and can go no further: they cannot constitutionally determine upon the amount of the compensation, or value of the land. Public exigencies do not require, necessity does not demand, that the Legislature should, of themselves, without the participation of the pro-
*313 prietor, or intervention of a jury, assess * the value of the thing, or ascertain the amount of the compensation to be paid for it. This can constitutionally be effected only in three ways. 1. By the parties—that is, by stipulation between the Legislature and proprietor of the land. 2. By commissioners mutually elected by the parties. 3. By the intervention of a Jury. . . .

*314 * The *Pennsylvania* claimants are directed to present their claims to the Board of Property—and what is the Board to do thereupon? Why, it is, 1. To judge of the validity of their claims. 2. To ascertain, by the aid and through the medium of commissioners, appointed by the Legislature, the quality and value of the land. 3. To judge of the quantity of vacant land to be granted as an equivalent.

This is not the constitutional line of procedure. I have already observed, that there are but three modes, in which matters of this kind can be conducted, consistently with the principles and spirit of the Constitution, and social alliance. The first of which is by the parties, that is to say, by the Legislature and proprietor of the land. . . .

But if the business cannot be effected in this way, then the value of the land, intended to be taken, should be ascertained by commissioners, or
*315 persons mutually elected by the parties, * or by the intervention of the Judiciary, of which a Jury is a component part. In the first case, we approximate nearly to a contract; because the will of the party, whose property is to be affected, is in some degree exercised; he has a choice; his own act co-operates with that of the Legislature. In the other case, there is the intervention of a court of law, or, in other words, a jury is to pass between the public and the individual, who, after hearing the proofs and allegations of the parties, will, by their verdict, fix the value of the property, or the sum to be paid for it. The compensation, if not agreed upon by the parties or their agents, must be ascertained by a jury. The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed; as long as it is preserved, the rights of private property will be in no danger of violation, except in cases of absolute necessity, or great public utility. By the confirming act, the value of the land taken, and the value of the land to be paid in recompense, are to be ascertained by the Board of Property. And who are the persons that constitute this board? Men appointed by one of the parties, by the Legislature only. The person, whose property is to be divested and valued, had no volition, no choice, no co-operation in the appointment; and besides, the other constitutional guard upon property, that of a jury, is removed and done away. The Board of Property thus constituted, are authorized to decide upon the value of the land to be taken, and upon the value of the land to be given by way of equivalent, without the participation of the party, or the intervention of a jury.

2. The nature of the compensation. By the act, the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained.

It is not only a sign which represents the respective values of commodities, but is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo,* and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalise the act, and makes it valid; nothing short of it will have the effect. It is obvious, that if a jury pass upon the subject, or value of the property, their verdict must be in money.

To close this part of the discourse: It is contended that the Legislature must judge of the necessity of interposing their despotic authority; it is a
*316 right of necessity upon which no other * power in government can decide:

That no civil institution is perfect; and that cases will occur, in which private property must yield to urgent calls of public utility or general danger. Be it so. But then it must be upon complete indemnification to the individual. Agreed: But who shall judge of this? Did there also exist a state necessity, that the Legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of the title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of this land-equivalent must be adjusted by the board of property, without the consent of the party, or the interference of a Jury? Alas! how necessity begets necessity. They rise upon each other and become endless. The proprietor stands afar off, a solitary and unprotected member of the community, and is stripped of his property, without his consent, without a hearing, without notice, the value of that property judged upon without his participation, or the intervention of a Jury, and the equivalent therefor in lands ascertained in the same way. If this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution, I ask, wherein it differs from the mandate of an *Asiatic* Prince? Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made. . . .

*320 * I shall close the discourse with a brief recapitulation of its leading points.

1. The confirming act is unconstitutional and void. It was invalid from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made. If so, the plaintiff's title remains in full force.

2. If the confirming act is constitutional, the conditions of it have not been performed; and, therefore, the estate continues in the plaintiff.

3. The confirming act has been suspended.—And

4. Repealed.

The result is, that the plaintiff is, by law, entitled to recover the premises in question, and, of course, to your verdict.

Verdict for the plaintiff.

William Marbury v. James Madison, Secretary of State of the United States.

Supreme Court of the United States, 1803.

[1 *Cranch,* 137.]

The supreme court of the United States has not power to issue a mandamus to the secretary of state of the United States, it being an exercise of *original* jurisdiction not warranted by the constitution.

Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.

An act of congress repugnant to the constitution, can not become a law.

The courts of the United States are bound to take notice of the constitution.

It seems, that a commission is not necessary to the appointment of an officer by the executive.

A commission is only *evidence* of an appointment.

Delivery is not necessary to the validity of letters patent.

The president cannot authorize the secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the president.

When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete.

A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles
*138 Lee, Esq. late attorney general of the United States, * severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state [John Marshall]; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a

rule was laid to shew cause on the fourth day of this term. This rule having been duly served, . . .

*153 * Afterwards, on the 24th of February the following opinion of the court was delivered by the Chief Justice [Marshall].

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why
*154 a mandamus * should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of enquiry is,

Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

*155 * It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which, the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution, declares that, "the presi- "dent shall nominate, and, by and with the advice and consent of the senate, shall "appoint ambassadors, other public ministers and consuls, and all other officers "of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the "United States." . . .

*162 * It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second enquiry; which is,

If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

*163 * The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where "there is a legal right, there is also a legal remedy by suit or action at law, when- "ever that right is invaded."

And afterwards, p. 109, of the same vol., he says "I am next to consider "such injuries as are cognizable by the courts of the common law. And herein I "shall for the present only remark, that all possible injuries whatsoever, that "did not fall within the exclusive cognizance of either the ecclesiastical, military, "or maritime tribunals, are for that very reason, within the cognizance of the "common law courts of justice; for it is a settled and invariable principle in the "laws of England, that every right, when withheld, must have a remedy, and "every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this enquiry the first question which
*164 presents itself, is, whether this can be arranged * with that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June, 1794, vol. 3, p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of
*165 this principle will certainly never be maintained. * No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown "without the intervention of its officers; for whom, the law, in matters of right, "entertains no respect or delicacy; but furnishes various methods of detecting the "errors and misconduct of those agents, by whom the king has been deceived and "induced to do a temporary injustice."

By the act passed in 1796, authorising the sale of the lands above the mouth of Kentucky river (vol. 3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required

by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed, that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with
*166 certain important political powers, in the * exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

*167 * The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely ap-

plied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oath of a magistrate, and proceeded to act as one; in consequence of which a suit has been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the president *168 of the United States appointed him a justice * of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on

1st. The nature of the writ applied for, and

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from the court of king's "bench, and directed to any person, corporation, or inferior court of judicature "within the king's dominions, requiring them to so some particular thing therein "specified, which appertains to their office and duty, and which the court of king's "bench has previously determined, or at least supposes, to be consonant to right "and justice."

Lord Mansfield, in 3d Burrows 1266, in the case of *The King v. Baker et al.* states in much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office,

"perform a service, or exercise a franchise (more especially if it be in a matter
"of public concern, or attended with profit) and a person is kept out of
*169 "possession, or dispossessed of such right, and * has no other specific legal
"remedy, this court ought to assist by mandamus, upon reasons of justice,
"as the writ expresses, and upon reasons of public policy, to preserve peace,
"order and good government." In the same case he says, "this writ ought to be
"used upon all occasions where the law has established no specific remedy, and
"where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular "thing therein specified, which appertains to his office and duty and which the "court has previously determined, or at least supposes, to be consonant to right "and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his
legal claims in a court of justice; to which claims it is the duty of that court
*170 to attend; should at first view be considered * by some, as an attempt to
intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus,

directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended, that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere
*171 organ of executive will; it is * again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore, is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act, in February, 1793, making it the duty of the secretary at war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain
*172 an adjudication of the supreme court of the United * States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal

right of the complainant was deemed, by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case—the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so
*173 * appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it, from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles "and usages of law, to any courts appointed, or persons holding office, under the "authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one

supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form,
*174 may be exercised over the present * case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared, that "the supreme court "shall have original jurisdiction in all cases affecting ambassadors, other public "ministers and consuls, and those in which a state shall be a party. In all other "cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

*175 * If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then, to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to be-
*176 long to * appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. In may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and
*177 if acts prohibited * and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

*178 * So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

*179 * Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any "state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares "that no bill of attainder or *ex post facto* law shall "be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason, unless "on the testimony of two witnesses to the same overt act, or on confession in open "court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is *180 apparent, that the framers of the constitution * contemplated that instrument as a rule for the government of *courts,* as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do "solemnly swear that I will administer justice without respect to persons, and "do equal right to the poor and to the rich; and that I will faithfully and im- "partially discharge all the duties incumbent on me as —— according to the "best of my abilities and understanding, agreeably to *the constitution* and laws "of the United States." Why does a judge swear to discharge his duties agre[e]- ably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall

be the *supreme* law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

McCulloch v. State of Maryland et al.

Supreme Court of the United States, 1819.

[4 *Wheaton* 316]

Congress has power to incorporate a Bank.

The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

There is nothing in the Constitution of the United States, similar to the articles of Confederation, which excludes incidental or implied powers.

If the *end* be legitimate, and within the scope of the constitution, all the *means* which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognisance.

The act of the 10th April, 1816, c. 44., to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any State.

The State, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

*317 * The States have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner controul the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government.

This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed on the proprietary interest which the citizens of that State may hold in this institution, in common with other property of the same description throughout the State.

ERROR to the Court of Appeals of the State of Maryland. This was an action of debt brought by the defendant in error, John James, who sued as well for himself as for the State of Maryland, in the County Court of Baltimore County, in the said State, against the plaintiff in error, McCulloch, to recover certain penalties, under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the Court by the parties, was affirmed by the Court of Appeals of the State of Maryland, the highest Court of law of said State, and the cause was brought, by writ of error, to this Court.

It is admitted by the parties in this cause, by their counsel, that there was passed on the 10th day of April, 1816, by the Congress of the United States, an act, entitled, "an act to incorporate the subscribers to the Bank of the United States;" and that there was passed, on the 11th day of February, 1818, by the General Assembly of Maryland, an act, entitled, "an act to impose a tax on all banks, or branches thereof, in the State of Maryland, *not chartered by the legis-*
*318 *lature,"* * which said acts are made part of this statement, and it is agreed, may be read from the statute books in which they are respectively printed. It is further admitted, that the President, Directors and Company of the Bank of the United States, incorporated by the act of Congress aforesaid, did organize themselves, and go into full operation in the City of Philadelphia, in the State of Pennsylvania, in pursuance of the said act, and that they did on the —— day of —— 1817, establish a branch of the said bank, or an office of discount and deposit in the city of Baltimore, in the state of Maryland, which has from that time until the first day of May, 1818, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank notes and discounting promissory notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said President, Directors and Company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said President, Directors and Company of the said Bank, had no authority to establish the said branch, or office of discount and deposit, at the city of Baltimore, from the State of Maryland, otherwise than the said State having adopted the constitution of the United States and composing one of the States of the Union. It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and
*319 * deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank notes therein described, from the said branch, or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank notes were not, nor was either of them, so issued on stamped paper in the manner prescribed by the act of Assembly aforesaid. It is further admitted, that the said President, Directors and Company of the Bank of the United States, and the said branch or office of discount and deposit, have not, nor has either of them, paid in advance, or otherwise, the sum of fifteen thousand dollars, to the treasurer of the Western Shore, for the use of the State of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the Governor and Council of the said State, was ready, and offered to deliver to the said President, Directors and Company of the said Bank,

and to the said Branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of Assembly.

The question submitted to the Court for their decision in this case, is as to the validity of the said act of the General Assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of Congress aforesaid, or to one of them. Upon the foregoing statement of
*320 facts, and the pleadings in this cause (all errors in * which are hereby agreed to be mutually released,) if the Court should be of opinion that the plaintiffs are entitled to recover, then judgment it is agreed shall be entered for the plaintiffs for twenty-five hundred dollars, and costs of suit. But if the Court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs to the defendant.

It is agreed that either party may appeal from the decision of the County Court, to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had, if a jury had been sworn and empannelled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the Court, and the Court's direction to the jury thereon. . . .

*400 * March 7th, 1819. MARSHALL, Ch. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it
*401 must be decided peacefully, or remain a source of * hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

*402 * In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has

been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

*403 * It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these Conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and

*404 secure * the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the

*405 influence of this fact on the case) is, * emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in
*406 express terms, decided it, by saying, * "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word
*407 in the articles * of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from

the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are
*408 entrusted to its government. It can never be pretended * that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, *that* raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it
*409 prohibit the creation of a corporation, * if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this

reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason,
*410 be allowed * to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed *before,* some *since* that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign, with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been
*411 asserted, we cannot well comprehend the process of reasoning * which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added
*412 that of making "all * laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say, that a legislature should exercise legislative powers, *413 in the shape of legislation? After allowing each house to prescribe * its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the Convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be *"necessary and proper"* for carrying them into execution. The word *"necessary,"* is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any *414 means calculated to * produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of

all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention

*415 understood itself to change materially * the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. . . .

*419 * This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

*420 * 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c. "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best

judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting
*421 * the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. . . .

*422 * If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose
*423 previous opinions * against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

*424 * After this declaration, it can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question.

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require
*425 branches; and the bank itself * may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire—

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as
*426 entirely * repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

*427 * The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their

*428 * acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be

limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are
*429 given by all, * for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on
*430 its government, we have an intelligible standard, applicable * to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry,
*431 whether this power can be exercised * by the respective States, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

*432 * If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend, that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to every thing else, the power of the States is supreme, and admits of no control, If this be true, the
*433 distinction between property and * other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed.

The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the *Federalist* has been quoted; and the opinions expressed by the authors of that work that have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is, "that an indefinite power of
*434 taxation in the latter (the government * of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time, abolish the taxes imposed for State objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of the *Federalist* are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these
*435 apprehensions, are to be understood as relating to the points they * mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the

States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between
*436 the action of the whole on a * part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States.

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the govern-
*437 ment * of the Union to carry its powers into execution. Such a tax must be unconstitutional. . . .

The Collector v. Day.

Supreme Court of the United States, 1870.

[11 *Wallace,* 113.]

It is not competent for Congress under the Constitution of the United States to impose a tax upon the salary of a judicial officer of a State.

Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of $61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate

*114 and * Insolvency for the County of Barnstable, State of Massachusetts.

The salary was fixed by law, and payable out of the treasury of the State. Day paid the tax under protest, and brought the action below to recover it.

The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. The defendant brought the case here for review; the question being, of course, whether the United States can lawfully impose a tax upon the income of an individual derived from a salary paid him by a State as a judicial officer of that State. . . .

*122 * Mr. Justice NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In *Dobbins* v. *The Commissioners of Erie County,*[1] it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government,

*123 which could not be interfered * with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch* v. *Maryland,*[2] and *Weston* v. *Charleston,*[3] were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Maryland.*[4] If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again,[5] "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in *Weston* v. *The City of Charleston,* he observes:[6] "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe."

It is conceded in the case of *McCulloch* v. *Maryland,* that the power of taxation by the States was not abridged by the grant of a similar power to the

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[1] 16 Peters, 435.

[2] 4 Wheaton, 316.

[3] 2 Peters, 449.

[4] 4 Wheaton, 432.

[5] Ib. 427.

[6] 2 Peters, 466.

government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there
*124 is no express constitutional prohibition upon the * States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins* v. *The Commissioners of Erie,* which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

*125 * The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County* v. *Oregon.*[1] "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legis-

[1] 7 Wallace, 76.

lative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limit but the will of the legislative
*126 * body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes,"
*127 but it shows that it is an original inherent * power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer

in *Dobbins* v. *The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno*,[1] in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch* v. *Maryland*, namely, "That the power to tax involves the power to destroy."

*128 * The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the docrine which we have endeavored to maintain.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, dissenting. . . .

[1] 8 Wallace, 533.

James Foster and Pleasants Elam, Plaintiffs in Error, vs. David Neilson, Defendant in Error.

Supreme Court of the United States, 1829.

[2 *Peters,* 253.]

In disputes between nations concerning national boundary based upon a treaty, the courts of each adopt the interpretation of their respective governments, and as there is no common tribunal the right remains with the strongest.

If the course of a nation has been a plain one its courts would hesitate to pronounce it erroneous.

It is the province of the court to conform its decisions to the will of the legislature if that will has been clearly expressed

A treaty is in its nature a contract between nations, not a legislative act; in the United States, however, it is a law and as such binding on courts of justice.

If it is not self-executory, the legislature must execute the contract before it becomes a rule for the court.

*299 * Mr. Chief Justice Marshall delivered the opinion of the Court.

This suit was brought by the plaintiffs in error in the court of the United States, for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpens of land, made by the Spanish governor, on the 2d of January 1804, to Jayme Joydra, and ratified by the king of Spain on the 29th of May 1804. The petition and order of survey are dated in September 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which *300 they can recover; that the territory, within which the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this Court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has with equal perseverance and earnestness, maintained, that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi. . . .

*307 * In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights,

and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think then, however individual judges might construe the treaty of St Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over
*308 her colonies; and a degree of disorder prevailed * in the Floridas, at which the United States could not look with indifference. In October 1810, the president issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion, which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April 1812, congress passed "an act to enlarge the limits of the state of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the state of Louisiana.

In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

And in February 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the third of March 1817, congress erected that part of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. 3 U. S. L. c. 4. 409.

In March 1819, "congress passed an act to enable the people of Alabama to form a constitution and state government." And in December 1819, she was admitted into the Union, and declared one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washingon, on the 22d day of February 1819, but was not ratified by Spain till the 24th day of October 1820; nor by the United States until
*309 the 22d day of February 1821. So that Alabama was * admitted into the Union as an independent state, in virtue of the title acquired by the United States to her territory, under the treaty of April 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain

its interest against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said, that this statement does not present the question fairly, because a plaintiff admits the authority of the Court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a Court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each. . . .

*314 * A treaty is in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. . . .

*317 * We are of opinion then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

Charles L. Williams v. The Suffolk Insurance Company.

Supreme Court of the United States, 1839.

[13 *Peters,* 415.]

The government of the United States having insisted, and continuing to insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the

competency of the Buenos Ayres government to regulate, prohibit, or punish; it is not competent for a circuit court of the United States to inquire into, and ascertain by other evidence, the title of the government of Buenos Ayres to the sovereignty of the Falkland islands.

When the executive branch of the government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.

Where a vessel, insured on a sealing voyage, was ordered by the government of Buenos Ayres not to catch seal off the Falkland islands, and having continued to take seal there the vessel was seized and condemned, under the authority of the government of Buenos Ayres; the government of the United States not having acknowledged, but having denied the right of Buenos Ayres to the Falkland islands; the insurers are liable to pay for the loss of the vessel and cargo: the master, in refusing to obey the orders to leave the islands, having acted under a belief that he was bound so to do as a matter of duty to the owners, and all interested in the voyage, and in vindication of the right claimed by the American government. The master was not bound to abandon the voyage under a threat or warning of such illegal capture.

On a certificate of division from the Circuit Court of the United States for the district of Massachusetts.

This was an action brought by the plaintiff, a citizen of the state of Connecticut, against the Suffolk Insurance Company of Boston, Massachusetts, to recover a loss, on part of the schooner Harriet, and part of her cargo, they having been insured by the defendants. There was a similar action against the defendants to recover losses sustained on the schooner Breakwater and her cargo. Both the cases were brought from the circuit court of Massachusetts on certificates of division of opinion of the judges of the circuit court. . . .

*418 * Mr. Justice M'LEAN delivered the opinion of the Court:—Two actions were commenced by the plaintiffs against the defendant, in the Circuit Court of the United States for the state of Massachusetts, on policies of insurance, dated 19th August, 1830; whereby the plaintiffs caused to be insured *419 by the defendants, for * nine per centum per annum premium, warranting twelve per centum, lost or not lost, forty-nine hundred and nineteen dollars on fifteen-sixteenths of the schooner Harriet; and eighteeen hundred and seventy-five dollars on board said vessel, at and from Stonington, Connecticut, commencing the risk on the 12th of August instant at noon, to the southern hemisphere; with liberty to stop for salt at the Cape de Verd islands, and to go round Cape Horn, and to touch at all islands, ports and places, for the purpose of taking seals, and for information and refreshments; with liberty to put his skins on board of any other vessel or vessels, until she returns to her port of discharge in the United States: it being understood that the value of the interest hereby insured, as it relates to this insurance, is not to be diminished thereby, &c.

On the same day there was a similar policy of thirty-five hundred dollars on the schooner Breakwater; and two thousand dollars on outfits on board, at the same premium, &c.

And on the trial, the following points were raised in the case, on which the opinions of the judges were opposed and on which the case is certified to this Court.

1. Whether, inasmuch as the American government has insisted, and does

still insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres; and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayres government to regulate, prohibit, or punish; it is competent for the Circuit Court in this cause, to inquire into, and ascertain by other evidence, the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands; and if such evidence satisfies the Court, to decide against the doctrines and claims set up and supported by the American government on this subject: or whether the action of the American government on this subject is binding and conclusive on this Court, as to whom the sovereignty of those islands belongs.

2. Whether, if the seizure of the Harriet by the authority of the Buenos Ayrean government, for carrying on the seal fishery at the Falkland islands, was illegal and contrary to the law of nations, on account of the said islands not being within the territorial sovereignty of the said Buenos Ayrean government; and the master of the Harriet had warning from the governor of the said islands under the government of Buenos Ayres, that he should seize the said Harriet if she should engage in the seal fishery; and after such warning, the master of the Harriet engaged in the seal fishery, and the Harriet was illegally seized and condemned therefor; the loss by such seizure and condemnation was a loss for which the plaintiff is entitled to recover in this case, if the master of the Harriet acted in engaging in such seal fishery bonâ fide, and with a sound and reasonable discretion, and under a belief that he was bound so to do
*420 as a matter of duty to his owners and all others interested in * the voyage; and in the vindication of the rights recognised and claimed by the American government: or whether he was bound by law to abandon the voyage under such a threat and warning of such illegal seizure.

As the fact is stated in the first point certified, that there is a controversy between this government and that of Buenos Ayres, whether the jurisdiction is rightful, which is assumed to be exercised over the Falkland islands by the latter; and that this right is asserted on the one side and denied by the other, it will not be necessary to look into the correspondence between the two governments on the subject.

To what sovereignty any island or country belongs, is a question which often arises before Courts in the exercise of a maritime jurisdiction; and also in actions on policies of insurance.

Prior to the revolution in South America, it is known, that the Malvinas, or Falkland islands, were attached to the vice-royalty of La Plata, which included Buenos Ayres. And if this were an open question, we might inquire whether the jurisdiction over these islands did not belong to some other part, over which this ancient vice-royalty extended, and not to the government of Buenos Ayres; but we are saved from this inquiry by the attitude of our own government, as stated in the point certified.

And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether

the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character. In the cases of Foster *vs.* Neilson, 2 Peters, 253. 307, and Garcia *vs.* Lee, 12 Peters, 511, this Court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive.

And we think in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland islands; the fact must be taken and acted on by this Court as thus asserted and maintained.

*421 * The decision of the first point materially affects the second, which turns upon the conduct of the master.

If these islands are not within the jurisdiction of the Buenos Ayrean government, the power assumed and exercised by Governor Vernet was unauthorized, and the master was not bound to regard it. He was not necessarily to be diverted from the objects of his voyage, and the exercise of rights which belonged to the citizens of the United States by an unauthorized threat of the seizure of his vessel. He might well consider the prohibition of Vernet as influenced by personal and sinister motives, and would not be enforced. If the principle were admitted, that the assured were bound to regard every idle threat of any individual who might assume to exercise power, as in this case, it would be most injurious, and in many cases destructive, to commercial rights.

The inquiry is, whether the master, under all the circumstances of the case, acted in good faith, and with ordinary prudence.

If he acted fraudulently, he was guilty of barratry; and the underwriters are discharged.

In Taunton, 858, Mr. Justice Gibbs, in giving the opinion of the Court, lays down the true rule. "The master," says he, "being asked why he had not British colours and British papers, said, I cannot have them, because I have not a British register. He stands on his strict rights. He says, I will do nothing to endanger my owners; I am a neutral, and I have a right to enter your port. The master really communicated the true facts of the case when she was searched; and says, I cannot go off, because of my charter-party. The other says: Then I will seize you. We think, then, each party stands on his strict rights; and we are now to consider the strict point of law, not the question whether it would have been more prudent for him to go to Tercera, but whether he acted bonâ fide."

And so in the present case, the question is not whether the master of the Harriet would not have acted with more prudence had he yielded to the inhibition of Vernet; but whether, in placing himself upon his strict rights, he did not exercise a proper discretion.

He violated no regulation which he was bound to respect. In touching at the Falkland islands, for the purpose of taking seal, he acted strictly within the limits of his commercial enterprise; and did not voluntarily incur a risk which should exonerate the insurers.

It was the duty of the master to prosecute his voyage, and attain the object of it, for the benefit of his owners: and, in doing this, he was not bound to abandon the voyage by any threat of illegal seizure. We think, therefore, that the underwriters are not discharged from liability, by the conduct of the master, as stated in the second point.

The other case depending upon the same principles, the same certificate will be affixed to that case.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the district of Massachusetts,
*422 * and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court, 1st, That, inasmuch as the American government has insisted and still does insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, the action of the American government on this subject is binding on the said Circuit Court, as to whom the sovereignty of those islands belongs. And, secondly: That the seizure and condemnation of the Harriet was a loss for which the plaintiff is entitled to recover in this case, under the circumstances as stated in the second point certified. Whereupon, it is ordered and adjudged by this Court, that it be so certified to the said Circuit Court, accordingly.[1]

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[1] In The Head Money Cases (112 U. S. 580, 598–599), decided in 1884, Mr. Justice Miller, speaking for a unanimous court, said:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

"But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

"A treaty is made by the President and the Senate. Statutes are made by the President,

Martin Luther, Plaintiff in Error, v. Luther M. Borden et al., Defendants in Error.[1]

Rachel Luther, Complainant, v. Luther M. Borden et al., Defendants.

Supreme Court of the United States, 1849.

[7 *Howard,* 1.]

At the period of the American Revolution, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second, making only such alterations, by acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent State.

But no mode of proceeding was pointed out by which amendments might be made.

In 1841 a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution, to be submitted to the people for their adoption or rejection.

This convention framed a constitution, directed a vote to be taken upon it, declared afterwards that it had been adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island.

Under it, elections were held for Governor, members of the Legislature, and other officers, who assembled together in May, 1842, and proceeded to organize the new government.

But the charter government did not acquiesce in these proceedings. On the contrary, it passed stringent laws, and finally passed an act declaring the State under martial law.

In May, 1843, a new constitution, which had been framed by a convention called together by the charter government, went into operation, and has continued ever since.

The question which of the two opposing governments was the legitimate one, viz. the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

The courts of Rhode Island have decided in favor of the validity of the charter government,

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the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

"In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."

In *In re* Baiz (135 U. S. 403, 431–2), Mr. Chief Justice Fuller, speaking for a unanimous court, said:

"We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof."—Editor.

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[1] Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice McKinley were absent on account of ill health when this case was argued.

and the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

*2 * The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding.

The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation.

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The President of the United States is vested with certain power by an act of Congress, and in this case he exercised that power by recognizing the charter government.

Although no State could establish a permanent military government, yet it may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands.

After martial law was declared, an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object; and if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

THESE two cases came up from the Circuit Court of the United States for the District of Rhode Island, the former by a writ of error, and the latter by a certificate of division in opinion. As the allegations, evidence, and arguments were the same in both, it is necessary to state those only of the first. They were argued at the preceding term of the court, and held under advisement until the present.

Martin Luther, a citizen of the State of Massachusetts, brought an action of trespass *quare clausum fregit* against the defendants, citizens of the State of Rhode Island, for breaking and entering the house of Luther, on the 29th of June, 1842. The action was brought in October, 1842. . . .

*34 * Mr. Chief Justice TANEY delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong,

and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial.

*35 The evidence offered by the plaintiff and the defendants is * stated at large in the record; and the questions decided by the Circuit Court, and brought up by the writ of error, are not such as commonly arise in an action of trespass. The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.

This is a new question in this court, and certainly a very grave one; and at the time when the trespass is alleged to have been committed it had produced a general and painful excitement in the State, and threatened to end in bloodshed and civil war.

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavouring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this Union; and it continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted

*36 in the election * of a convention to form a new constitution to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which he offered to

vote for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people,—permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of
*37 the adverse party as * unlawful and disorganizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But, notwithstanding the determination of the charter government, and of those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings, which it is not material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places

at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island.

The difficulties with the government of which Mr. Dorr was the head were soon over. They had ceased before the constitution was framed by the convention elected by the authority of the charter government. For after an unsuccessful attempt made by Mr. Dorr in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepatchet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation the charter government
*38 continued to assert its authority * and exercise its powers, and to enforce obedience, throughout the State, arresting and imprisoning, and punishing in its judicial tribunals, those who had appeared in arms against it.

We do not understand from the argument that the constitution under which the plaintiff acted is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the secretary of state of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas.

It is this opinion of the Circuit Court that we are now called upon to review. It is set forth more at large in the exception, but is in substance as above stated; and the question presented is certainly a very serious one. For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the oppos-

ing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation
*39 * to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavouring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavoured to maintain its authority.

*40 Indeed, we do not see how the question could be tried and * judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try.

If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government.

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest.

*41 * Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

And if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence, such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgments as to the freehold qualification of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

The court had not the power to order a census of the freeholders to be taken; nor would the census of the United States of 1840 be any evidence of the number of freeholders in the State in 1842. Nor could the court appoint per-

sons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen, and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?

But this is not all. The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted. The decision would, therefore, have
*42 depended upon the relative * credibility of witnesses, and the weight of testimony; and as the case before the Circuit Court was an action at common law, the question of fact, according to the seventh amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the constitution which the plaintiff supported was adopted by a majority of the citizens of the State, or of the voters entitled to vote by the existing law. Another jury in another case might find otherwise. And as a verdict is not evidence in a suit between different parties, if the courts of the United States have the jurisdiction contended for by the plaintiff, the question whether the acts done under the charter government during the period in contest are valid or not must always remain unsettled and open to dispute. The authority and security of the State governments do not rest on such unstable foundations.

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the
*43 Constitution, providing for cases of domestic violence. * It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endevouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

*44 * It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this

decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin *v.* Mott, 12 Wheat. 29–31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which
*45 authorizes the call to suppress an insurrection against a State * government. The power given to the President in each case is the same,—with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said, that, "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet

the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that
*46 state of things the officers engaged in its military service * might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners, to proceed against certain descriptions of persons in certain places by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right in the reign of Charles the First. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defence, when assailed by an armed force; and the cases and commentaries concerning these commissions cannot, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government.

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court. The admission of evidence to prove that the charter government was the established government of the State was an irregularity, but is not material to the judgment. A Circuit Court of the United States sitting in Rhode Island is presumed to know the constitution and law of the State. And in order to make up its opinion upon that subject, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer. But this error of the Circuit Court does not affect the result. For whether this evidence was or was not received, the Circuit Court, for the reasons herein before stated, was bound to recognize that government as the paramount and established authority of the State.

Much of the argument on the part of the plaintiff turned upon political
*47 rights and political questions, upon which the * court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must therefore be affirmed. . . .

*48 * Mr. Justice WOODBURY, dissenting.[1]

The writ in this case charges the defendants with breaking and entering the plaintiff's dwelling-house, on the 29th of June, 1842, and doing much damage.

The plea in justification alleges, that, on June 24th, 1842, an assembly in arms had taken place in Rhode Island, to overawe and make war upon the State. And therefore, in order to protect its government, the legislature, on the 25th of that month, passed an act declaring the whole State to be under martial law. That the plaintiff was assisting in traitorous designs, and had been in arms to sustain them, and the defendants were ordered by J. Child, an officer in the militia, to arrest the plaintiff, and, supposing him within the house named in the writ, to break and enter it for the purpose of fulfilling that order; and, in doing this, they caused as little damage as possible.

The replication denied all the plea, and averred that the defendants did the acts complained of in their own wrong, and without the cause alleged.

To repel the defence, and in vindication of the conduct of the plaintiff, much evidence was offered; the substance of which will be next stated, with some leading facts proved on the other side in connection with it.

The people of Rhode Island had continued to live under their charter of 1663 from Charles the Second, till 1841, with some changes in the right of suffrage by acts of the legislature, but without any new constitution, and still leaving in force a requirement of a freehold qualification for voting. By the growth of the State in commerce and manufactures, this requirement had for some time been obnoxious; as it excluded so many adult males of personal worth and possessed of intelligence and wealth, though not of land, and as it made the ancient

[1] The court was unanimous in holding that the question presented for its consideration was political. Mr. Justice Woodbury concurred for the reasons expressed in the first part of his opinion; in the second part, he dealt exclusively with the question of martial law, only dissenting from the opinion of the court on this matter.—Editor.

apportionment of the number of representatives, founded on real estate, very disproportionate to the present population and personal property in different portions and towns of the State.

This led to several applications to the legislature for a change in these matters, or for provision to have a convention of the people called to correct it by a new constitution. These all failing, voluntary societies were formed
*49 in 1841, * and a convention called by them of delegates, selected by the male adults who had resided one year in the State, with a view chiefly to correct the right of suffrage and the present unequal apportionment of representatives. This, though done without the formalities or recommendation of any statute of the State, or any provision in the charter, was done peacefully, and with as much care and form as were practicable without such a statute or charter provision. A constitution was formed by those delegates, a vote taken on its ratification, and an adoption of it made, as its friends supposed, and offered to prove, by a decided majority, both of the freehold voters and of the male adults in the State.

Political officers for the executive and legislative departments were then chosen under it by those in its favor, which officers assembled on the 3d of May, 1842, and took their respective oaths of office and appointed several persons to situations under the constitution, and among them the existing judges of the superior court.

After transacting some other business the next day,—but the old officers in the State under the charter not acknowledging their authority, nor surrendering to them the public records and public property,—they adjourned till July after, and never convened again, nor performed any further official duties. Nor did they institute actions for the possession of the public records and public property; but T. Dorr, the person elected governor, at the head of an armed force, on the 25th of June, 1842, in his supposed official capacity, made some attempt to get possession of the public arsenal; but failing in it, he dismissed the military assembled, by a written order, on the 27th of June, and left the State. He stated as a reason for this, "that a majority of the friends of the people's constitution disapprove of any further forcible measures for its support."

In the mean time, the officers under the old charter, having, as before suggested, continued in possession of the public records and property, and in the discharge of their respective functions, passed an act, on the 24th of June, placing the State under martial law. A proclamation was then issued by the governor, warning the people not to support the new constitution or its officers, and another act was passed making it penal to officiate under it. An application was made to the President of the United States for assistance in quelling the disturbances apprehended, but was answered by him on the 29th of May, 1842, not complying with the request, though with expressions of willingness to do it, should it, in his opinion, afterwards become necessary.

*50 Nothing further seems to have been done by him in the * premises, except that on the 29th of June, the day of the trespass complained of in this action, a proclamation was prepared under his direction, but not issued, denouncing such of the supporters of the new constitution as were in arms to be "insurgents," and commanding them to disperse.

It was next shown by the respondents, that Dorr, the governor elect under the new constitution, was, in August, 1842, indicted for treason against the State, and being apprehended in 1844, was then tried and convicted.

It further appears that the court, at the trial of the present cause, ruled out the evidence offered by the plaintiff in support of his conduct, and admitted that which went to justify the defendants, and decided that the old charter, and not the new constitution, was in force at the time the act passed declaring martial law, and that this law was valid, and, as pleaded, justified the defendants in their behaviour.

Without entering here at more length into details concerning the unhappy controversy which agitated Rhode Island in 1842, it is manifest that it grew out of a political difficulty among her own people, in respect to the formation of a new constitution. It is not probable that the active leaders, and much less the masses, who were engaged on either side, had any intention to commit crimes or oppress illegally their fellow-citizens. Such, says Grotius, is usually, in civil strife, the true, liberal view to be taken of the masses. (Grotius on War, B. 3, ch. 11, sec. 6.) And much more is it so, when, in a free country, they honestly divide on great political principles, and do not wage a struggle merely for rapine or spoils. In this instance each side appears to have sought, by means which it considered lawful and proper, to sustain the cause in which it had embarked, till peaceful discussions and peaceful action unexpectedly ripened into a resort to arms, and brother became arrayed against brother in civil strife. Fortunately, no lives were destroyed, and little property injured. But the bitterness consequent on such differences did not pass off without some highly penal legislation, and the extraordinary measure of the establishment of martial law over the whole State. Under these circumstances, it is too much to expect, even at this late day, that a decision on any branch of this controversy can be received without some of the leaven of former political excitement and prejudice, on the one side or the other by those who were engaged in its stirring scenes. Public duty, however, seems to require each member of this court to speak freely his own convictions on the different questions which it may be competent for us to decide; and when one of those members, like myself, has the misfortune
*51 to differ in any respect from the rest, to explain * with frankness, and undeterred by consequences, the grounds of that difference.

This difference, however, between me and my brethren extends only to the points in issue concerning martial law. But that being a very important one in a free government, and this controversy having arisen in the circuit to which I belong, and where the deepest interest is felt in its decision, I hope to be excused for considering that point fully; and for assigning, also, some additional and different reasons why I concur with the rest of the court in the opinion, that the other leading question, the validity of the old charter at that time, is not within our constitutional jurisdiction. These two inquiries seem to cover the whole debatable ground, and I refrain to give an opinion on the last question, which is merely political, under a conviction that, as a judge, I possess no right to do it, and not to avoid or conceal any views entertained by me concerning them, as mine, before sitting on this bench and as a citizen, were frequently and publicly avowed.

It must be very obvious, on a little reflection, that the last is a mere political question. Indeed, large portions of the points subordinate to it, on this record, which have been so ably discussed at the bar, are of a like character, rather than being judicial in their nature and cognizance. For they extend to the power of the people, independent of the legislature, to make constitutions,—to the right

of suffrage among different classes of them in doing this,—to the authority of naked majorities,—and other kindred questions, of such high political interest as during a few years to have agitated much of the Union, no less than Rhode Island.

But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbé Sièyes, but the people. Judges, for constitutions, must go
*52 to the people of their own country, and must * merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation.

Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the State of the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after theirs ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them. We speak what is the law, *jus dicere,* we speak or construe what is the constitution, after both are made, but we make, or revise, or control neither. The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights,—not what is *meum* and *tuum,*—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision

by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments
*53 as * belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times. Again, instead of controlling the people in political affairs, the judiciary in our system was designed rather to control individuals, on the one hand, when encroaching, or to defend them, on the other, under the Constitution and the laws, when they are encroached upon. And if the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution, than on the people themselves in their primary capacity as makers and amenders of constitutions.

Hence the judiciary power is not regarded by elementary writers on politics and jurisprudence as a power coördinate or commensurate with that of the people themselves, but rather coördinate with that of the legislature. Kendall *v.* U. States, 12 Peters, 526. Hence, too, the following view was urged, when the adoption of the Constitution was under consideration:—"It is the more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the *latter* within the limits assigned to their authority." (Federalist, No. 77, by Hamilton.) "Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both," &c., &c.

But how would this superiority be as to this court, if we could decide finally on all the political claims and acts of the people, and overrule or sustain them according only to our own views? So the judiciary, by its mode of appointment, long duration in office, and slight accountability, is rather fitted to check legislative power than political, and enforce what the political authorities have manifestly ordained. These last authorities are, by their pursuits and interests, better suited to make rules; we, to expound and enforce them, after made.

The subordinate questions which also arise here in connection with the others, such as whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and none others; and whether, in great exigencies of oppression by the legislature itself, and refusal by it to give relief, the people may not take the subject into
*54 their own hands, independent of the legislature; * and whether a simple plurality in number on such an occasion, or a majority of all, or a larger proportion, like two thirds or three fourths, shall be deemed necessary and proper for a change; and whether, if peacefully completed, violence can afterwards be legally used against them by the old government, if that is still in possession of the public property and public records; whether what are published and acted on as the laws and constitution of a State were made by persons duly chosen or not, were enrolled and read according to certain parliamentary rules or not, were

in truth voted for by a majority or two thirds;—these and several other questions equally debatable and difficult in their solution are in some aspects a shade less political. But they are still political. They are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealous fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves.

Non nostrum tantas componere lites. Where, then, does our power, as a general rule, begin? In what place runs the true boundary-line? It is here. Let the political authorities admit as valid a constitution made with or without previous provision by the legislature, as in the last situation Tennessee and Michigan were introduced into the Union. (See Federalist, No. 40, and 2 Ell. Deb., 57; 13 Regis by Y. 95, 1164, and Cong. Globe, App., 78, 137, 147.) Let the collected will of the people as to changes be so strong, and so strongly evinced, as to call down no bills of pains and penalties to resist it, and no arming of the militia or successful appeals to the general government to suppress it by force, as none were in some cases abroad as well as in America, and one recently in New York, which might be cited beside those above. (See A. D. 1846, and opinion of their judges.) In short, let a constitution or law, however originating, be clearly acknowledged by the existing political tribunals, and be put and kept in successful operation. The judiciary can then act in conformity to and under them. (Kemper *v.* Hawkins, 1 Virg. Cas., 74, App.) Then, when the claims of individuals come in conflict under them, it is the true province of the judiciary to decide what they rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully or wisely made.

Again, the Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their con-
*55 stitutions. * (See Article 3, sec. 2.) Though at first the federal judiciary was empowered to entertain jurisdiction where a State was a party in a suit, it has since been deprived even of that power by a jealous country, except in cases of disputed boundary. (Art. 3, sec. 2; Amendment 11th; Massachusetts *v.* Rhode Island, 12 Peters, 755.)

If it be asked what redress have the people, if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those, they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of constitutions. And when the former fail, and these last are forbidden by statutes, all that is left in extreme cases, where the suffering is intolerable and the prospect is good of relief by action of the people without the forms of law, is to do as did Hampden and Washington, and venture action without those forms, and abide the consequences. Should strong majorities favor the change, it generally is completed without much violence. In most states, where representation is not unequal, or the right of suffrage is not greatly restricted, the popular will can be felt and triumph through the popular vote and the delegates of the people in the legislature, and will thus lead soon, and peacefully, to legislative measures ending in reform, pursuant to legislative countenance and without the necessity of any stronger collateral course. But when the representation is of a character which

defeats this, the action of the people, even then, if by large majorities, will seldom be prosecuted with harsh pains and penalties, or resisted with arms.

Changes, thus demanded and thus supported, will usually be allowed to go into peaceful consummation. But when not so allowed, or when they are attempted by small or doubtful majorities, it must be conceded that it will be at their peril, as they will usually be resisted by those in power by means of prosecutions, and sometimes by violence, and, unless crowned by success, and thus subsequently ratified, they will often be punished as rebellious or treasonable.

If the majorities, however, in favor of changes happen to be large, and still those in power refuse to yield to them, as in the English revolution of 1688, or in our own of 1776, the popular movement will generally succeed, though it be only by a union of physical with moral strength; and when triumphant, it will, as on those occasions, confirm by subsequent forms of law what may have begun without them.

There are several other questions, also, which may arise under our
*56 form of government that are not properly of judicial * cognizance. They originate in political matters, extend to political objects, and do not involve any pecuniary claims or consequences between individuals, so as to become grounds for judicial inquiry. These questions are decided sometimes by legislatures, or heads of departments, or by public political bodies, and sometimes by officers, executive or military, so as not to be revisable here. (See Decatur *v.* Paulding, 14 Peters, 497.)

Looking to all these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new constitution; and, as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinions, enforce it till duly altered. But it is not necessary to rest this conclusion on reasoning alone. Several precedents in this court, as well as in England, show the propriety of it.

In Foster el al. *v.* Neilson, 2 Peters, 309, where the title to the property depended on the question, whether the land was within a cession by treaty to the United States, it was held that after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that the question was a political one, the decision of which, having been made in this manner, they must conform to. (See, also, 6 Peters, 711, and Garcia *v.* Lee, 12 Peters, 520; 13 Peters, 419.) In the Cherokee Nation *v.* The State of Georgia, 5 Peters, 20, the court expressed strong doubts whether it was not a political question, not proper for their decision, to protect the Cherokee Indians in their possessions, and to restrain the State of Georgia and construe and enforce its treaty obligations. Justice Johnson seemed decisive that it was.

In Massachusetts *v.* Rhode Island, 12 Peters, 736, 738, it was held that the boundaries between States was a political question *per se*, and should be adjusted by political tribunals, unless agreed to be settled as a judicial question, and in the Constitution so provided for. (Garcia *v.* Lee, Ib., 520.)

In Barclay *v.* Russel, 3 Ves. 424, in respect to confiscations, it was held to be a political question, and a subject of treaty, and not of municipal jurisdiction. (p. 434.)

In Nabob of the Carnatic *v.* The East India Company, 2 Ves. jun. 56, the court decided that political treaties between a foreign state and subjects of Great

Britain, conducting as a state under acts of Parliament, are not a matter of municipal jurisdiction, and to be examined and enforced by the judiciary.

Another class of political questions, coming still nearer this, is, Which
*57 must be regarded as the rightful government abroad * between two contending parties? That is never settled by the judiciary, but is left to the decision of the general government. (The Cherokee Case, 5 Peters, 50; and Williams *v.* Suffolk Ins. Co., 13 Peters, 419; 2 Cranch, 241; Rose *v.* Himely, 4 Cranch, 268; United States *v.* Palmer, 3 Wheat. 634; and Gelston *v.* Hoyt, Ib., 246; The Divina Pastora, 4 Wheat. 64; 14 Ves. 353; 11 Ves. 583; 1 Edw. Ad. 1.)

The doctrines laid down in Palmer's case are as directly applicable to this in the event of two contending parties in arms in a domestic war as in a foreign. If one is recognized by the executive or legislature of the Union as the *de facto* government, the judiciary can only conform to that political decision. See, also, the Santissima Trinidad, 7 Wheat. 336, 337; and, further, that if our general government recognizes either as exclusively in power, the judiciary must sustain its belligerent rights, see 3 Sumner, 270. In the case of the City of Berne *v.* The Bank of England, 9 Ves. 348, it was held that "a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits." The same rule has been applied by this court in case of a contest as to which is the true constitution, between two, or which possesses the true legislative power in one, of our own States,—those citizens acting under the new constitution, which is objected to as irregularly made, or those under the old territorial government therein. *Semb.* Scott et al. *v.* Jones et al., 5 Howard, 374. In that case we held that no writ of error lies to us to revise a decision of a State court, where the only question is the validity of the statute on account of the political questions and objections just named. It was held, also, in Williams *v.* Suffolk Ins. Co., 3 Sumner, 270, that, where a claim exists by two governments over a country, the courts of each are bound to consider the claims of their own government as right, being settled for the time being by the proper political tribunal. And hence no right exists in their judicial authorities to revise that decision. (pp. 273, 275; S. C., 13 Peters, 419.) "*Omnia rite acta.* It might otherwise happen, that the extraordinary spectacle might be presented of the courts of a country disavowing and annulling the acts of its own government in matters of state and political diplomacy."

This is no new distinction in judicial practice any more than in judicial adjudications. The pure mind of Sir Matthew Hale, after much hesitation, at last consented to preside on the bench in administering the laws between private parties under a government established and recognized by other governments, and in full possession *de facto* of the records and power of the kingdom,
*58 but without feeling satisfied on inquiring, as a * judicial question, into its legal rights. Cromwell had "gotten possession of the government," and expressed a willingness "to rule according to the laws of the land,"—by "red gowns rather than red coats," as he is reported to have quaintly remarked. And this Hale thought justified him in acting as a judge. (Hale's Hist. of the Com. Law, p. 14, Preface.) For a like reason, though the power of Cromwell was soon after overturned, and Charles the Second restored, the judicial decisions under the former remained unmolested on this account, and the judiciary went on as before, still looking only to the *de facto* government for the time being.

Grotius virtually holds the like doctrine. (B. 1, ch. 4, sec. 20, and B. 2, ch. 13, sec. 11.) Such was the case, likewise, over most of this country, after the Declaration of Independence, till the acknowledgment of it by England in 1783. (3 Story's Com. on Const., §§ 214, 215.) And such is believed to have been the course in France under all her dynasties and *régimes,* during the last half-century.

These conclusions are strengthened by the circumstance, that the Supreme Court of Rhode Island, organized since, under the second new constitution, has adopted this principle. In numerous instances, this court has considered itself bound to follow the decision of the State tribunals on their own constitutions and laws. (See cases in Smith *v.* Babcock, 2 Woodb. & Min.; 5 Howard, 139; Elmendorf *v.* Taylor, 10 Wheat. 159; Bank of U. S. *v.* Daniel et al., 12 Peters, 32.) This, of course, relates to their validity when not overruling any defence set up under the authority of the United States. None such was set up in the trial of Dorr, and yet, after full hearing, the Supreme Court of Rhode Island decided that the old charter and its legislature were the political powers which they were bound to respect, and the only ones legally in force at the time of this transaction; and accordingly convicted and punished the governor chosen under the new constitution for treason, as being technically committed, however pure may have been his political designs or private character. (Report of Dorr's Trial, 1844, pp. 130, 131.) The reasons for this uniform compliance by us with State decisions made before ours on their own laws and constitutions, and not appealed from, are given by Chief Justice Marshall with much clearness. It is only necessary to refer to his language in Elmendorf *v.* Taylor, 10 Wheat. 159.

Starting, then, as we are forced to here, with several political questions arising on this record, and those settled by political tribunals in the State and general government, and whose decisions on them we possess no constitutional authority to revise, all which, apparently, is left for us to decide is the
*59 * other point,—whether the statute establishing martial law over the whole State, and under which the acts done by the defendants are sought to be justified, can be deemed constitutional.

To decide a point like this last is clearly within judicial cognizance, it being a matter of private personal authority and right, set up by the defendants under constitutions and laws, and not of political power, to act in relation to the making of the former. . . .

THE PRIZE CASES.

The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, The Schooner Brilliante.

Supreme Court of the United States, 1862.

[2 *Black*, 635.]

A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war.

A civil war exists, and may be prosecuted on the same footing as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be kept open.

The present civil war between the United States and the so-called Confederate States, has such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war; and they have, therefore, the right *jure belli* to institute a blockade of any ports in possession of the rebellious States.

The proclamation of blockade by the President is of itself conclusive evidence that a state of war existed, which demanded and authorized recourse to such a measure. . . .

*636 * These were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships *637 of the United States. The libels were filed by * the proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal. . . .

*665 * Mr. Justice GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized States?[1]

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. *666 They have a right to enter the ports * of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Com-

[1] Only the opinion of Mr. Justice Grier on the first point is printed. In the omitted portion of the opinion the court answered the second question in the affirmative.—Editor.

mander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the *"jus belli,"* and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto,* and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced
*667 hostilities * against their former sovereign, the world acknowledges them as belligerents, and the contest a *war. They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents,

its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prose-
*668 cuted * on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be *"unilateral."* Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on *that account,* for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized *"a state of war as existing by the act of the Republic of Mexico."* This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

*669 This greatest of civil wars was not gradually developed by * popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war.* The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless

there be two belligerent parties. In the case of the *Santissima Trinidad,* (7 Wheaton, 337,) this Court say: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest
*670 civil war known in the history of the human race, and thus cripple the * arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the Government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itselt official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress *"ex majore cautela"* and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

*671 * Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, *"omnis ratihabitio retrotrahitur et mandato equiparatur,"* this ratification has operated to perfectly cure the defect. In the case of *Brown* vs. *United States,* (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *expost facto,* and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli,* to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard. . . .

*682 * Mr. Justice NELSON, dissenting. . . .[1]

*699 * Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD, concurred in the dissenting opinion of Mr. Justice Nelson.

The State of Mississippi v. Johnson, President.

Supreme Court of the United States, 1866.

[4 *Wallace,* 475.]

1. The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed.
2. It makes no difference whether such incumbent of the Presidential office be described in the bill as President or simply as a citizen of a State.

THIS was a motion made by Messrs. *Sharkey* and *R. J. Walker,* on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and *President of the United States,* and his officers and agents

[1] The opinion of Mr. Justice Nelson is omitted, holding that, as by the Constitution of the United States, war can only be declared by the Congress it could not lawfully be declared by a proclamation of the President without the previous action of Congress.—Editor.

appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two acts of Congress named in the bill, one "An act for the more efficient government of the rebel States," passed March 2d, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an act supplementary to it, passed in the same way March 23d, 1867; acts commonly called the Reconstruction Acts.

The former of these acts, reciting that no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military districts, and made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals,
*476 either through the local civil tribunals or through military * commissions, which the act authorized. It provided, further, that on the formation of new constitutions and certain conditions which the act prescribed, the States respectively should be declared entitled to representation in Congress and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede it.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the States in question.

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity."

The bill went on:

"The acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to exert sovereign power over it—and the utter destruction of the State must be the consequence of their execution. They also violate a well-known salutary principle in governments, the observance of which can alone preserve them, by making the civil power subordinate to the military power, and thus establish a military rule over the States enumerated in the act, and make a precedent by which the government of the United States may be converted into a

military despotism, in which every man may be deprived of his goods, lands,
*477 liberty, and life, by the breath * of a military commander, or the sentence of the military commission or tribunal, without the benefit of trial by jury, and without the observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen. And the more effectually to accomplish this purpose the said acts divide the ten Southern States into five military districts, and make it the duty of the President to assign an officer to the command of each district, and to place a sufficient force under him, whose will is to be the law and his soldiers the power that executes it. It is declared to be his duty to protect all persons in their rights of person and property; to suppress insurrections, disorder, and violence; and to punish, or cause to be punished, all disturbers of the peace and criminals; and he may organize military commissions and tribunals to try offenders when he may think proper. But, by what rule or law is he to judge of the rights of person or property? By what rule or law is he to arrest, try, and punish criminals? By what rule or law is he to judge whether they have committed crimes? The answer to these questions is plain,—by his own will; for, though he may adopt the State authorities as his instruments if he will, yet he may reject them if he will. A scope of power so broad, so comprehensive, was never before vested in a military commander in any government which guards the rights of its citizens or subjects by law. It embraces necessarily all those subjects over which the States reserved the power to legislate for themselves, as essential to their existence as States, including the domestic relations, all the rights of property, real and personal; the rights of personal security and personal liberty; and assumes the right to control the whole of the domestic concerns of the State. These acts also provide that the governments now existing in the Southern States are but provisional governments, subject to the paramount authority of Congress, which may at any time abolish, modify, control, or supersede them."

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a *mere minis-*
*478 *terial duty,* to the execution of said acts, as though they * were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine,* as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

Messrs. Sharkey, R. J. Walker, and Garland, by briefs filed:

Can the President of the United States be made a party defendant to this

bill? There is no precedent directly to the point. Yet it is believed the question has been virtually settled. It is important, in this connection, to mark the distinction between what are called political powers and such as are ministerial. In the exercise of discretionary or political powers, courts will not undertake to control the action of officers; but not so with regard to ministerial duties, in the exercise of which no one is above the law, however exalted his position. Fortunately, we have neither a king nor an emperor, nor a parliament, who are omnipotent or above the Constitution.

Our Constitution declares that "the judicial power shall extend to *all* cases in law and equity arising under this Constitution," &c. And thus the judiciary are made the guardians and protectors of the Constitution.

The President is but the creature of the Constitution, one of the agencies
*479 created by it to carry it into practical operation; * and it would be strange if he should be permitted to exert his agency in violating that instrument, and then claim exemption from the process of the court whose duty it is to guard it against abuses, because he is the chief executive officer of the government, and especially when he is exerting a mere ministerial duty; for that is all he does exert in executing an act of Congress; he has no discretion in the matter. The Constitution makes no distinction as to parties. The case is the criterion, no matter who is plaintiff or who defendant; and if the President be exempt from the process of the law, he is above the law. On the trial of Aaron Burr, an application was made for a *subpœnâ duces tecum,* to be directed to the President of the United States; and the application was resisted on the ground that the President was not amenable to the process of the court, and could not be drawn from the discharge of his duties at the seat of government, and made to attend the court sitting at Richmond. But Chief Justice Marshall, who tried the case, drew the distinction between the President and the King of England, and held that all officers in this country were subordinate to the law, and must obey its mandate, and, therefore, sustained the application. There, the *subpœnâ duces tecum* was only a command to the President to do a particular thing. Here, the injunction asked for is but a command to him not to do a particular thing under a void authority. The principle is the same in the two cases, as well as the means of coercing obedience; and the reasoning of Chief Justice Marshall reaches and settles the question now before this court. The Constitution provides, indeed, that all officers may be impeached; but this does not exonerate them from personal liability for acts done under color of office, the President as well as other officers.

If the President be exempt, why not all his cabinet officers? They all constitute but parts of the executive department of the government. Yet in *Marbury* v. *Madison, Secretary of State,*[1] it was decided that the acts of the Secretary
*480 * of State were the acts of the President, and that the secretary might be subjected to the process of *mandamus*. Why would it not just as well lie against the President? It would be strange to hold that the subordinate is liable and may be sued for acts which are the acts of his principal, and yet that the principal is not liable and cannot be subjected to the process of law. Even more recently, in the cases of Mr. Kendall, Postmaster-General, and of Mr. Guthrie, Secretary of the Treasury, this court has decided that officers of the executive department are liable to the process of the court.[2] The case of *Ellis* v. *Earl Gray,*[3] is a leading case in England, and has been approved in this court. It was there decided that the Lords of the Treasury, constituting the prominent department of the executive government, might be enjoined by the judicial department. In that country,

[1] 1 Cranch, 137.

[2] Kendall *v.* United States, 12 Peters, 524; United States *v.* Guthrie, 17 Howard, 284.

[3] 6 Simons, 214.

the King is supposed to be above the law, and is the fountain of justice; yet his immediate subordinate departments are not above it. In this country the President is not above the law; it is above him, and hence he must be subject to its restraints.

In *The State of Ohio ex rel.* v. *Chase, Governor,*[1] the objection was raised that a *mandamus* would not lie against the governor. But, in delivering the opinion, Chief Justice Bartley said:

"Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage, the least as feeling its care, and the greatest as not being exempt from its power."

If the chief executive officer of a State is liable to be controlled by the courts of the State in the discharge of ministerial duties, for much stronger reasons is the chief executive officer of the United States liable to be controlled by this
*481 court under the provisions of the Federal Constitution. In * *Greene* v. *Mumford,*[2] the Supreme Court of Rhode Island said, in regard to officers:

"If they are departing from the power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under their commission, but treats them as individuals."

By the same principle, the President, when acting in opposition to the Federal Constitution, may be treated as an idividual.

II. Does the bill present a case proper for the interposition of this court? [The learned counsel then went fully into this point, enlarging upon and enforcing, by argument and authority, the position set forth in the bill itself.]

Mr. Stanbery, A. G., contra:

It is manifest here that the case made against Andrew Johnson is not made against him as an individual, as a natural person, for any acts that he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States. The evil complained of, so far as he is concerned, is in the execution of what he considers to be his official duty, as they say, notwithstanding his vetoes, to execute certain acts of Congress by appointing the necessary officers. By his seeing to the execution of those laws the mischief ensues of which they complain; and, therefore, they ask this court to make him a party defendant, they ask this court to submit him, as President, to the process of *subpœna;* to compel his attendance; to bring him, as President, within the power of this court; and to compel him, by the power which a court of equity possesses to enforce its decrees, to do that, in regard to these laws, which this court may deem to be proper.

The opposing counsel admit that this is a case of the first impression; that
*482 they have no precedent for such a bill; but * they have certain analogies, they think, under which this court will find power to bring the President here, and make him perform the behests of this court. It will be observed that there is no allegation that the President is about to do anything of his own motion, which, as President, he is not authorized to do. The allegation is, that he is about to execute certain laws passed by Congress; that he considers it his duty to execute

[1] 5 Ohio State, 529.

[2] 5 Rhode Island, 472.

those laws; but that this court is a better judge of his duty as President than the President himself; and that when he seeks to execute a law, and to avoid impeachment and denouncement as unfaithful to his duty as Executive, this court is to interfere and tell him what his duty is in the premises, and compel him to perform it.

Now, I beg attention to the cases upon which the counsel rely, not as in point, but as in close analogy; and, first of all, is what was decided in the case of Burr, by Chief Justice Marshall. In the course of the prosecution against Colonel Burr, his counsel deemed it necessary that they should have possession of a certain letter written to the then President, Mr. Jefferson, by General Wilkinson. It did not exactly appear whether it was a private letter or an official letter, but it was said to be a letter in the possession of the President. The counsel of Colonel Burr moved for a subpœna to be issued by the court to the President, commanding him to appear and bring with him that paper. The question was argued by the counsel for the United States, and by the counsel for Colonel Burr; and, although the counsel for the United States did not admit that such process could be issued against the President, they waived the point, and the whole argument was upon the right of the party to have the paper itself. They got upon that side issue, and did not argue, but merely stated the other point, that, according to their idea, a subpœna could not issue against the President. However, when Chief Justice Marshall came to decide the matter, undoubtedly he was of opinion that a subpœna might issue against the President, as President, to produce a paper in his possession as President. Counsel in this case argue
*483 from that, if the President is liable to the process of the * court by subpœna to testify, he is liable to the process and the action of the court as a party to abide any order which the court may make. I will go a step or two further with that case, to show how, notwithstanding the opinion that was delivered by the Chief Justice, the court came to a point in which they would not take another step.

When the subpœna was received by the President, Mr. Jefferson, he did not give to it any notice. He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated, that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpœna; that he *would not go;* that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpœna. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpœna, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error with the greatest submission to the great Chief Justice, who, on circuit, at *nisi prius,* suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpœna of any court as President.

Is not the proposition subversive of all ideas of what government is and of the purposes for which a President is put in the executive chair, that whenever there are controversies between individuals anywhere in the United States and the President even in his natural capacity happens to know anything about them, wherever the process of the court can extend to him territorially, he is bound

*484 to quit * his office, to leave his place at the head of the government, and to attend to the business of the individual citizen; to remit his duties over the whole and attend to his duties to the individual? I know in that case of Burr an attempt was made to distinguish between the President and a king or queen of Great Britain, for it was acknowledged by every one that there was no authority in England for a suit or a subpœna or any command to the head of the government to appear before any court. But it is said that that depended upon the divinity which hedged a king or crowned head; that with us our President had no such immunity; that he could do wrong, although the King of England could not do wrong; that he was liable to punishment, liable under certain circumstances to process, and they attempted to make a distinction between the two. Undoubtedly so far as the mere individual man is concerned there is a great difference between the President and a king; but so far as the office is concerned—so far as his position as the great executive officer of this government is concerned—I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world.

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits *485 in another chamber of this Capitol. There * he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

But what would be the consequences if the court should issue this subpœna against the President now, and like Mr. Jefferson he should decline to obey it, not out of any disrespect to this court, but out of respect to the high office which he fills? If the court should entertain this case, and direct its subpœna to issue to the President, what will come if, as is inevitable, he will not obey it? No man in the nation entertains a higher respect for this court than he does, but as the custodian of his office, as the person there representing the nation, it is not for Andrew Johnson to speak; it is for the President. He has no particular personal dignity of his own to take care of, but he is bound to take care of the dignity, the rights, and the prerogatives that belong to him as President. The one he may lay down and be as humble as he pleases; the other he cannot lay down. What then will be the consequences? I may suggest them.

If, under such advice and such action as is inevitable if this subpœna is issued, the President declines to obey it, treats the writ issued to him as one which he cannot obey and dare not obey, what next must your honors be called upon to do? Precisely what the Chief Justice was called upon to do in the case of Burr. The gentlemen at once move in this court for an attachment against

the President for disobedience of a lawful order of this court that he shall attend and answer this complaint. If the President is liable to the subpœna, as the gentlemen say he is, then he is liable to answer as defendant, and when the subpœna is served upon him, whether he comes or not, if it is a lawful subpœna, he is within the jurisdiction of this court; he is a * party here, and bound therefore by every act and every order which the court makes in this case. What, then, is the order, what is the relief, what is the judgment that the opposite counsel require? It is that he, as President, shall be enjoined from performing and executing two acts of Congress. If, when the President is here by a service of the subpœna, the court proceed in the case, and find it a case in which they are ready to order an injunction to issue to the President to command him not to execute those laws, and notwithstanding, the President goes on to execute them, what follows? That the court must now sustain its own dignity, for the court has a dignity and a power to be observed as well as the President. The next step here, then, is to move for an attachment, or a rule on the President, to show cause why an attachment should not issue against him; for what? For a contempt of this court; that whereas the court ordered him to abstain from proceeding further in the execution of these laws, in defiance of that order the President has gone on to do some acts in execution of the laws. He is therefore brought here by what kind of process? By process *quasi criminal;* by process of attachment to answer for a contempt of the court. Now we have subpœnas no longer; now we have process compelling his attendance, which goes to the marshal, and when we come to the proper point, process that goes to the marshal commanding him to bring the person of the President before this court to answer to this court for a disobedience of its process.

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Now let us suppose the case to go so far as it must go in order to give the relief that is claimed; what sort of a spectacle have we? One great department of this government has arraigned another, and the executive department of the government, represented by the President, brought before the judicial department—for what purpose? To be punished criminally; for if he stands out and makes no apology to the court, and does not purge himself of the contempt in failing to obey its orders, the court is bound to put him in jail or to fine him; ordinarily to put him in jail, and, if he still persists, * to keep him in jail without any remedy, for in cases of commitment for contempt no *habeas corpus,* as every one knows, can ever reach the prisoner. No other court can release the President from this imprisonment, by *habeas corpus* or otherwise. He is there a close prisoner of this court, and to remain there until he dies, unless he performs the orders of the court.

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What then? The President deposed; the President made incapable of performing the duties of his office! Certainly a jail, or a dungeon it may be, is not a fit place to perform the duties and functions of President. You have made the President incapable of performing his duties. What is the effect of that? You have removed the President, for that is one of the conditions in which the President's office becomes vacant, that he is incapable of performing his duties. You have done it more effectually than by impeachment, for an impeachment does not deprive him of liberty; an impeachment sets him at large, and simply takes from him his official character; but the order of this court under these circumstances takes him as President and puts him in jail, and keeps him there until he performs what this court orders him to perform. That vindicates, it is true, the right of the State of Mississippi, or it may vindicate the right of any individual who has some claim to have an injunction against the President; but as to all the rest of us! as to the people, as to the government itself, what becomes of them under these circumstances and the exercise of that power? What becomes of the

public safety, the *salus populi,* the supreme law of all laws, that this court, a coordinate branch of the government, bound to respect the other branches of the government, not to interfere with their duties or their privileges or their rights—that this court has in effect taken, destroyed, annihilated the President who is put there by the people? You leave the government without a head; you leave the office vacant, and the people must go about to get another President to perform these functions and these duties. In the meantime, until that is done, every-
*488 thing is at large, and there is not a law of the United States that can * be executed, not an officer that can be appointed or an officer that can be removed. There is no one left to proclaim insurrection, if that shall happen. There is no one left to perform all the duties which for the safety of this people as a nation are reposed in the President. To correct a particular evil, to guard a particular individual or a particular State against the acts of the President, there is no way, according to the gentlemen, but to depose that President by a proceeding like this, and, for the correction of this lesser evil, to produce that enormous evil which affects not merely the State of Mississippi, but every other State of the Union and every individual.

Is this the way to treat the head of the government?

Take the common case of an ambassador who comes here from another government, who is not the chief of that government, neither a king nor the president of any republic, but who simply comes here to represent a foreign government. Can you sue him? Can you make him liable? Can you bring him within the jurisdiction of this court, or any other court, unless he chooses to come here voluntarily as a plaintiff? Not at all. His person is sacred. Why? Not on account of any natural dignity that pertains to him, but because he represents a sovereign; he is sent here by the chief executive of some other state—it may be a king, it may be a president—and as representing that foreign sovereign he is no more liable to suit here than the foreign sovereign himself would be, no matter what mischief he may do. I say he is not only not liable to civil suit, but not to criminal proceedings. If the representative of some foreign sovereign, should in a moment of passion kill some one in this District, some one of our own citizens, absolutely murder him—a thing most improbable indeed—but suppose the case—is there a court in the United States that could try that representative for that offence? I am putting the strongest case possible. There is a great mischief, to be sure; the representative has done a great injury; he has taken life; but in that extremest of all cases you cannot correct that
*489 great mischief and enormous wrong by committing * the greater wrong of making him, the representative of another government, liable here to suit or prosecution. All you can do is to remand him and send him out of the country, and to require his own government to punish him for the offence he has committed. You have no jurisdiction over him.

The counsel, then, are altogether wrong in their argument that wherever there is a right there must be a remedy—wherever there is a wrong done there must be a means of righting that wrong. Not so; at any rate not in this case.

In support of their right to file this bill, opposite counsel refer to some authorities. They are cases that have been before this court, of proceedings not against the President, but against certain high officers of the government who have been brought in the court or made amenable to the process of the court.

First, let me say that there is a clear diversity between those cases and this. The various heads of departments who have been sued here, such as in the case of Mr. Kendall and Mr. Guthrie, and Mr. Madison while he was Secretary of State, are at last but subordinates. They are agents to carry out the executive power, but they are not the depositaries of the executive power. They have

functions to perform, and although they are agents, they are public agents, and we must take care to see our way clearly, when we bring them into court for official action or official misconduct, how it should be done, whether at the instance of a private individual or otherwise. The only cases in which the court has maintained jurisdiction over the heads of departments in order to compel them to execute laws are cases of *mandamus* to compel a Postmaster-General, a Secretary of State, or a Secretary of the Treasury to do something; and the court has always been strict in maintaining that jurisdiction; cautious at every step. That jurisdiction has been exercised again and again, but always with this limitation, that the thing required to be done is a simple *ministerial* act required to be done by the officer in virtue of some specific law. It is a thing as to which he has no
*490 discretion * whatever; in which not the President merely but some law requires him to [do] some one thing. He is commanded by the legislative department to do some one thing in which a citizen is interested and he refuses to do it. The court have said in such a matter as that, being purely ministerial and directed by law, we will require that officer to do that thing. They have never said as to the President that where *he* is directed by law to do some single thing, although ministerial in its character merely, involving no discretion or the performance of any particular duty except the duty to obey that particular statute, that a *mandamus* could go against *him,* in such a case. The counsel can find no such *dictum* even. In the case of a mere subordinate officer the court may very well enforce its authority, even to the point of imprisoning him for contempt; because, taking a Secretary from the head of his department, or an Attorney-General from his office, or a Postmaster-General from his department, does not stop the government, does not interfere with any great branch or department of the government. The President is there to make another Attorney-General, or another Postmaster-General, or another Secretary. That does not interfere with the public interests. The government goes on just as well whether one officer is there or another officer is put in his place. But, notwithstanding that, as I have said, this court have exercised that sort of jurisdiction very carefully. I have not, however, found a case like this, a case in which a suit has been entertained by this court against an executive officer as such officer, or an injunction allowed against him, against the performance of his duty as an executive officer.

The English courts have set their faces against such suits. *Macbeath* v. *Haldimand,*[1] was an action brought against Haldimand for certain things done by him in his capacity of Governor of Quebec. The case was argued in banc, in 1786, and Lord Mansfield, Mr. Justice Ashurst, Mr. Justice Willes, and Mr. Justice Buller held that he was not personally liable for bills of exchange drawn by him as Governor.

*491 * The case of *Gidley* v. *Lord Palmerston*[2] establishes the doctrine that on principles of public policy an action will not lie against persons acting in a public character and situation.

The view I maintain has been expressed in this court, so far as the President is concerned. In *Kendall* v. *United States,*[3] the court say:

"The executive power is vested in the President. As far as his power is derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution,—through the impeaching power."

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[1] 1 Durnford and East, 172.

[2] 3 Broderip and Bingham, 275.

[3] 12 Peters, 610.

There it is. As President, he is beyond the control of any other department, except through the impeaching power. For what is he reached by the impeaching power? The highest crimes and misdemeanors. Therefore, according to this, for the highest crimes and misdemeanors, he is, as President, above the power of any court or any other department of the government. Only in that other chamber can you arraign him for anything done or omitted to be done while he is President.

The State of Ohio, ex rel., v. *Chase, Governor,* is relied on by the other side; but that was a case where the Governor was directed by law to issue a certain proclamation upon the existence of certain facts which were admitted to exist; and it was held that, as the thing to be done did not necessarily appertain to the office of Governor, but was simply a duty imposed by a statute, the court might issue a *mandamus* to compel the performance of the ministerial act prescribed by statute.

So far as this bill seeks to make the President a party, I have said from the first that it was scandalous. I mean, of course, in legal language; that is to say, a suit not fit to be brought, and which no court in the United States can sustain. Therefore it is that as *amicus curiæ,* or as law officer next the
*492 President, I have felt bound, at the first motion * made to file this bill, to attempt to keep so scandalous a thing from the records of this court.

It is with the approbation, advice, and instruction of the President that I appear here to make this objection. I should have felt bound to make it on my own motion, as the law officer of the government. But although counsel, in their bill, have said that the President has vetoed these acts of Congress as unconstitutional, I must say, in defence of the President, this, that when the President did that he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws. He has instructed me to say that in making this objection, it is not for the purpose of escaping from any responsibility either to perform or to refuse to perform.

Mr. R. J. Walker, in reply:

The main question is whether a bill to restrain the President of the United States by injunction issuing from this court from carrying into effect an act of Congress forbidden by the Constitution, and therefore unconstitutional and void, being a proceeding to enjoin the President from the performance of a mere ministerial duty (for by his veto he admits it to be a mere ministerial duty which he is compelled to do), is, in fact, a proceeding against the government of the United States, and whether such a bill can be entertained by this tribunal.

This is not a suit against the President of the United States only, giving the name of no individual, at all, as was the suit of the *Governor of Georgia* v. *Juan Madrazo,* known to the Attorney-General. That case was different, and the court well remarked that no process could issue unless against the State, because there was no individual named against whom any process could issue. But the President of the United States is not the government of the United States.

The President, in a suit like this, does not represent all the departments of
*493 the government. The distinction * is drawn in the clearest manner by Chief Justice Marshall, in the great case of Burr.[1] He there said:

[1] Trial of Aaron Burr, by Combs, p. 45.

"The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

"By the Constitution of the United States, the President, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors.

"By the Constitution of Great Britain the crown is hereditary, and the monarch can never be a subject.

"By that of the United States, the President is elected from the mass of the people, and on the expiration of the time for which he is elected returns to the mass of the people again.

"How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the Executive Chief will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a State, at any rate, under the former Confederation, and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum.*

"If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this court."

In that case the awful consequences, which have been referred to so eloquently by my learned brother, of attaching the President of the United States, and compelling him by process of attachment to obey the subpœna, were all
*494 argued * before Chief Justice Marshall gave this opinion. It was owing to entirely extraneous causes that it became unnecessary to carry it out; but this opinion was never recalled, nor changed, nor modified in any respect whatsoever. Of course, if the court had a right to issue a *subpœna duces tecum* to the President of the United States in the same manner as to any other person, it would follow, as a necessary consequence, that the court had a right to follow out a disobedience to that subpœna by the process of attachment for contempt.

The Attorney-General has said that if this court, in the performance of its duty, should proceed under its oath of office to defend the Constitution of the United States from violation, even by the hands of the President, the President could not obey its order, and that there would be brought on a direct and fearful conflict between the President and this great tribunal.

But who has contended more strongly and with more ability than this very President of the United States, in various veto messages, for the final character of the decisions of the Supreme Court of the United States in all cases involving a construction of its Constitution? Who has urged, from time to time, with more ability and force than this President the great doctrine that all the departments of this government are sworn to support the Constitution of the United States, and that this great tribunal, this arbiter, was created by the Constitution to avoid just such a result as the Attorney-General has referred to; was created for the peaceful and final and ultimate decision of all such questions as this? What! The President of the United States not obey the mandate of this court? If he does not, he disobeys the mandate of the Constitution.

It is said that the President merely follows the example of Thomas Jefferson

in refusing to obey the subpœna. But the matter in the case of President Jefferson was not carried out. It was not necessary to carry it out. What the court would have done if the necessity had existed may be inferred from the opinion of Chief Justice Marshall. Moreover, I believe that Mr. Jefferson used to
*495 boast that he was no lawyer; * we know that he had no very favorable opinion of lawyers, or of judges, and especially no very favorable opinion of the Supreme Court of the United States, or of the great man who presided there—Chief Justice Marshall—during the period when he, Mr. Jefferson, was President of the United States. Upon a judicial question like this I shall not attempt to compare the opinion of President Jefferson with that of Chief Justice Marshall and the Supreme Court of the United States, and of Madison, as shown in the recent publication of the fourth volume of his writings. These carry out the idea set forth by Hamilton, and Madison, and Jay, in the Federalist, at the very time when the Constitution was pending for its ratification before the people, and set forth plainly before them that the Constitution had created one great tribunal, the Supreme Court, for the peaceful decision of all questions of constitutional law. What can be stronger than the language of Mr. Madison, that where two laws conflict with each other, the tribunal which is to expound and interpret the law is to decide which shall prevail? that when you take up an act of Congress on one page, and take up the Constitution on the other, if the act of Congress is in conflict with the prohibitions of the Constitution, that instrument declares it to be utterly null and void? Such was the opinion of Jay, and Madison, and Hamilton. Such was the sense in which the people of all the States understood the Constitution when it was framed, as shown by the debates. Such was the opinion of the first Congress, composed of many of the men who had framed the Constitution, who in the twenty-fifth section of the Judiciary Act gave final jurisdiction to this court in all cases involving the construction of the Constitution, laws, and treaties of the United States, even on appeal from the highest judicial State tribunals.

If there is anything that is definitely settled for three-fourths of a century by repeated and manifest decisions of this court, the opinions of the framers of the Constitution, and the great statesmen of the day, it is that this is the tribunal and the only tribunal created by the Constitution whose decision is
*496 final and conclusive upon the interpretation * of the Constitution. I think that this court will answer the statement in which the Attorney-General has lapsed as to the inevitable disobedience of the President to a writ of this court, as it answered a menace when the Legislature and High Court of Error and Appeals of Virginia declared that *they* would not obey the final mandate of the Supreme Court of the United States. The answer which was given to that menace by the court, through Chief Justice Marshall, its organ, in delivering its opinion, is found in the case of *Cohen* v. *Virginia*.[1]

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts or whatever difficulties a case may be attended we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Such was the answer given by this court, in that day, to the Legislature of Virginia, then all-powerful, and to the unanimous resolve of the High Court of

[1] 6 Wheaton, 264.

Errors and Appeals of that great State, then composed of distinguished jurists and statesmen; that for this court to refuse to take jurisdiction in a case given them by the fundamental law, whatever the consequences might be, whoever might menace disobedience to the mandate of the court, would be treason to the Constitution. So I say here, that if this court shall issue its mandate, declaring an act of Congress to be unconstitutional, and restraining the President or Secretary of War, or any of the officers of the army or navy, from the execution of that act—whoever shall resist that mandate of the court by force will be guilty of treason.

[Mr. Walker next commented in detail upon the cases which had been cited, arguing from them that no officer is above the law, but that all are amenable and responsible to it.]

*497 * The Attorney-General has shown a picture of the calamities which would follow, if the President of the United States should disobey the mandate of this court. Let us look at the calamities that might follow, on the other hand, if this court declines to exercise the power which I think is granted by the Constitution, and permits these military laws to go into effect. What then? According to the President's own opinion, as expressed in his veto messages, the Constitution of the United States is, by the Reconstruction Acts, subverted and overthrown, and a military despotism is erected upon its ruins. Ten States are to be expelled from the Union; ten millions of people are to be deprived of all the benefits of the Constitution; deprived of the right of trial by jury. These ten States are cut up into five military districts; people are to be tried outside of their States for offences unknown and undefined, merely at the will of a military officer; deprived of the right of trial by jury; all this in time of profound peace, when Congress itself, speaking, as it has done in several acts, of "States lately in rebellion," admits that there is no rebellion in the land; deprived of their rights and privileges of American citizens. So far as constitutional liberty is concerned, they might as well be living under a Czar or a Sultan, upon the banks of the Bosphorus or the Neva, as in this free country. Life, liberty, and property may be taken from them without due process of law.

The CHIEF JUSTICE [Chase] delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

*498 The Attorney-General objected to the leave asked for, upon * the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury* v. *Madison, Secretary of State,*[1] furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

*499 * So, in the case of *Kendall, Postmaster-General,* v. *Stockton & Stokes,*[2] an act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshal, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

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[1] 1 Cranch, 137.

[2] 12 Peters, 527.

*500 * It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the
*501 President refuse obedience, it is needless to * observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

DENIED.

State of Georgia v. Stanton.

Supreme Court of the United States, 1867.

[6 *Wallace,* 50.]

1. A bill in equity filed by one of the United States to enjoin the Secretary of War and other officers who represent the Executive authority of the United States from carrying into execution certain acts of Congress, on the ground that such execution would annul and totally abolish the existing State government of the State and establish another and different one in its place—in other words, would overthrow and destroy the corporate existence of the State by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would be maintained—calls for a judgment upon a political question, and will therefore not be entertained by this court.
2. This character of the bill is not changed by the fact that in setting forth the political rights sought to be protected, the bill avers that the State has real and personal property (as for example, the public buildings, &c.), of the enjoyment of which, by the destruction of its corporate existence, the State will be deprived; such averment not being the substantive ground of the relief sought.

THIS was a bill filed April 15, 1867, in this court, invoking the exercise of its original jurisdiction, against Stanton, Secretary of War; Grant, General of the Army, and Pope, Major-General, assigned to the command of the Third Military District, consisting of the States of Georgia, Florida, and Alabama (a district organized under the Acts of Congress of the 2d March, 1867, entitled "An act to provide for the more efficient government of the rebel States," and an act of the 23d of the same month supplementary thereto), for the purpose of restraining the defendants from carrying into execution the several provisions of these acts; acts known in common parlance as the "Reconstruction Acts." Both these acts had been passed over the President's veto.

[The former of the acts, reciting that no legal State governments or adequate protection for life or property now existed in the rebel States of Virginia and North Carolina, South Carolina, *Georgia,* Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military dis-
*51 tricts and * made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform

his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, *either through the local civil tribunals or through military commissions,* which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed by a convention of delegates elected by male citizens, &c., of twenty-one year old and upwards, "of whatever race, color, or previous condition," who had been residents in it for one year, "except such as may be disfranchised for participation in the rebellion," &c., and when such constitution should provide, &c., and should be ratified by a majority of the persons voting on the question of ratification, who were qualified for electors as delegates, and when such constitution should have been submitted to Congress for examination and approval, and Congress should have approved the same, and when the State by a vote of its legislature elected under such constitution should have adopted a certain article of amendment named, to the Constitution of the United States, and ordaining among other things that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside," and when such article should have become a part of the Constitution of the United States, then that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

The second of the two acts related chiefly to the registration of voters
*52 who were to form the new constitutions of the * States in question, and which registration by the act, could include only those persons who took and subscribed a certain oath set forth in such second act, as that they had "not been disfranchised for participation in any rebellion or civil war against the United States," &c.

The bill set forth the existence of the State of Georgia, the complainant, as one of the States of this Union under the Constitution; the civil war of 1861-1865 in which she was involved; the surrender of the Confederate armies in the latter year, and submission to the Constitution and laws of the Union; the withdrawal of the military government from Georgia by the President, commander-in-chief of the army; and, the revival and reorganization of the civil government of the State with his permission; and that the government thus reorganized was in the possession and enjoyment of all the rights and privileges in her several departments—executive, legislative, and judicial—belonging to a State in the Union under the Constitution, with the exception of a representation in the Senate and House of Representatives of the United States.

It set forth further that the intent and design of the acts of Congress, as was apparent on their face and by their terms, was to overthrow and to annul this existing State government, and to erect another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees; and that, in furtherance of this intent and design, the defendants (the Secretary of War, the General of the Army, and Major-General Pope), acting under orders of the President, were about setting in motion a portion of the army to take military possession of the State, and threatened to subvert her government, and to

subject her people to military rule; that the State was wholly inadequate to resist the power and force of the Executive Department of the United States. She therefore insisted that such protection could, and ought, to be afforded by a decree, or order, of this court in the premises.

The bill then prayed that the defendants might be restrained:

*53 * 1. From issuing any order, or doing, or permitting any act or thing within or concerning the State of Georgia, which was or might be directed or required of them, or any of them, by or under the two acts of Congress.

2. From causing to be made any registration within the State, as specified and prescribed in the last of the aforesaid acts.

3. From administering, or causing to be administered within the State, the oath or affirmation prescribed in said act.

4. From holding, or causing to be held within the State, any such election, or elections, or causing to be made any return of any such elections for the purpose of ascertaining the result of the same according to said act.

5. From holding, or causing to be held within the State, any such convention as is prescribed therein.

The bill in setting forth the political rights of the State of Georgia, and of its people sought to be protected, averred among other things, that the State was owner of certain real estate and buildings therein (the State capitol, at Milledgeville, and Executive mansion), and of other real and personal property, exceeding in value $5,000,000; and that putting the acts of Congress into execution and destroying the State would deprive it of the possession and enjoyment of its property. This reference and statement were not set up, however, as a specific or independent ground of relief, but apparently only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it. And the matter of property was not noticed in the prayers for relief.

Mr. Stanbery, A. G., at the last term moved to dismiss the bill for want of jurisdiction.

In support of this motion. Our first objection is that we have not such parties here as authorize this court to entertain any case. Who is this controversy with? It is with officers of the United States of a very high grade. Is it with them as individuals? Not at all; but with them as officers of the United States,

*54 who have no State citizenship, * but are bound to reside here. The place of official residence of the Secretary of War and commanding general is by law in the District. Now, when you are asked to entertain the limited jurisdiction given to this court in an original case, and find that as to parties it must, by the terms of the Constitution,[1] be a controversy between "a State and *citizens* of another State," is there anything that fulfils the idea of such a controversy? Suppose to-morrow Mr. Stanton is removed, or resigns his post as Secretary of War, what becomes of Stanton, a citizen of Ohio, defendant in this case? Is there any controversy left between Georgia and Stanton as an individual and a citizen of Ohio? None.

Next, as to the nature of the right set up here, the alleged infractions of that right, and the relief which is asked from this court to establish that right.

The bill is premature; it involves at the same time a political question only. It involves, therefore, a political question which may never arise. The uncertainty

[1] Article III, § 2.

whether *any* question will ever arise, and the fact that if any does arise it will be political, are both fatal to the bill.

Look at the state of things when this bill was filed. A controversy that raged a few weeks ago in Congress is brought here to be settled. The President attempted to settle it. Constitutionally he attempted to give the relief which is sought here. In the exercise of his constitutional powers, the President, while these acts were upon their passage, attempted to stop them by his veto, but Congress, also acting under the Constitution, passed them over his veto, by the requisite majority. The laws were passed. Now if there is jurisdiction in this court to stop the execution of these laws, there was jurisdiction on the 24th of March, when the last act was passed, before the President had even appointed military commanders; because the danger threatened here is altogether prospective. But what would this be? Nothing but judicial veto; a veto, in fact, far superior to the Presidential veto. A judicial veto, a judicial sentence of a
*55 court * of the last resort is final, and one which no Congress, and no two-thirds in Congress, could change or modify. It would stand as fixed as the law pronounced by a tribunal that remains here for life; it could not be set aside by any changes in the popular sentiment. It would be settled forever. This would be an absolute veto; the same veto that the Roman Tribunes had. What was that? Those officers, chosen during the Republic to protect the interests of the people, called Tribunes, had no insignia of office. No rods or lictors preceded them; no emblems of sovereignty accompanied them. They had not a house; they sat on benches. They dared not enter the Senate-house. They could only be elected from the plebeians. And yet the majesty of the Roman people was represented by them, and they had authority, by pronouncing one word, *veto,* to stop every ordinance of the Senate, to stop the execution of every law, absolutely and conclusively, without any appeal. That power was called by Cæsar *ultima jus Tribunorum.* What is this but that?

If this can be done, the same jurisdiction may be invoked wherever a court can get nominal parties; may be invoked in regard to every law that Congress may pass before it proceeds to execution, and before as yet a case has arisen under it. In the present case, the complainant carries his prayer for an injunction down to the meeting of the convention. But he might as well carry it further, and ask to enjoin the convention from framing a constitution; a little further, and enjoin the people from ratifying the constitution; a little further yet, and enjoin the president of the convention from sending that new constitution here to the President of the United States; a step further, and enjoin the same President from sending that constitution to Congress; a step further, and enjoin Congress from accepting it. For, after all, that is the point; that works all the mischief, and nothing but that does work it, for until Congress acts all that is done is unimportant. Why not, then, have gone a step further, and, to get relief, have now enjoined Congress from ratifying the Constitution?

*56 * If there is a power in this court to veto laws which the Congress considers wholesome and necessary, such a power has never before been invoked. A suggestion that there should be some such a power was made in the convention that framed the Constitution. The scheme then presented was not half so bad as this, but something like it was proposed by Mr. Randolph, the elder. In the convention he offered this resolution:

Resolved, That the executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legis-

lature be again passed, or that of a particular legislature be again negatived by —— of the members of each branch.

Here was an attempt to give a qualified veto power, to be vested, not in the judiciary alone, but in the judiciary with the executive, sitting as a council of revision upon every law after its passage, before it had gone into operation, before its mischiefs were developed. It found no favor with the convention; it was rejected; and instead of that, the actual veto power as it now exists, proposed by General Pinckney, was adopted, separating the judiciary from the consideration of such questions, leaving them to consider a law only when it should regularly come before them in its execution upon a proper case and with proper parties.

The case is political and uncertain in every way that you look at it. It is a bill by a State to vindicate its political rights. The State of Georgia here comes into court alleging that it is a State, putting that matter in issue. We do not make any question now as to a court of equity being a fit court to decide whether a State is in the proper enjoyment of its political franchises. Opposite counsel allege that Georgia is now a State of the Union, and ask the court to find
*57 that it is so. If they allege it as a matter of fact, we * have a right to deny it; and what is the consequence? If this court has jurisdiction to decide that Georgia is a State, it has just the same jurisdiction to decide that Georgia is not a State, and that great political question, State or not a State, is settled and settled forever by this court.

The Cherokee Nation v. *The State of Georgia*[1] goes far to decide this case. The attempt there was by the Cherokees, as a separate nation, to prevent the execution of certain laws of Georgia violating their rights secured by treaty. But the court declined to interfere in this way. It acted upon what was declared long before by Ellsworth, C. J., in *New York v. Connecticut*[2] "In no case can a specific performance be decreed unless there is a substantial right of soil, not a *mere political jurisdiction to be enforced.*"

But what next? It is alleged that Georgia has certain political rights and privileges, and also that she has certain property. We can see very well where the learned counsel were tending when they came to that part of the case, and that they had at least some inkling of the difficulties of bringing a State into a court of equity to vindicate its political rights and the franchises and rights of its citizens. They saw that there was no precedent for such a proceeding as that. They saw the necessity of founding the equity jurisdiction of the court upon the State of Georgia as a corporation, and as a corporation whose franchises and rights were about to be disturbed, and therefore entitled to preventive relief, as an individual would be to protect his property and his rights from irreparable mischief and injury. But although it is mentioned that the State owns lands, it is not alleged that anybody is going to take those lands. It does not appear that anybody has erected a nuisance on those lands or is about to erect one. It does not appear that anybody is about to bring suit in regard to those lands, and that it is necessary to stop litigation and prevent the State being vexed by suits. It is simply alleged that the State has such lands. These military officers do not
*58 propose * to take the lands, nor can they take them. What, then, is the danger to these lands? It is, that if finally these acts are consummated,—if finally there is a new constitution provided for Georgia, and ratified by the people of Georgia, which new constitution becomes the constitution of that State, the present organism of Georgia ceases; the present State government is displaced and loses its hold of these lands. Then where do they go? Who does the present government hold them for? For the people of Georgia for public uses. If a new constitution shall come into operation and be ratified by the people of Georgia, the new

[1] 5 Peters, 1. [2] 4 Dallas, 5; 2d ed., *note*.

government will hold these lands for the same purposes, not for waste, not for destruction, not for changing their destination, not as in the case of a charity to devote them to other uses, not as in the case of the property of a private corporation to turn them to other uses and to the purposes of a foreign corporation, but at last, change the form of government as you please, the people of the State of Georgia will own all their lands, undisturbed in any way, if these laws are carried out.

Before we even touch these lands, before we touch a single one of these rights of Georgia, this court is asked to interpose. And what is it asked to do? I take a distinction between matters that lie in the choice or discretion of the commanding general as to the extent to which he will execute military law there and other matters. He has simply said: "I will execute the law." Now, under the acts, he can execute it in either of two ways. He can execute it by making it a military despotism at once, by unshipping all the civil tribunals, courts, and officers, or he can execute the law just as well by leaving them all untouched. It is not alleged that Pope threatens that he is going to displace the governor, the legislature, the courts, the executive officers, the whole machinery of civil government in Georgia. He has simply said that he will execute the law. Whether he will execute it by the rigor of martial rule, displacing the civil authorities, or execute it by leaving them all in perfect play, he has never said.

The first practical thing to be done under these laws is the appointment of
*59 * boards of registry to make a registration of voters, preparatory to the election. That is the initiatory step. It has not yet been taken, but it is to be taken; and the especial prayer of this injunction is to stop that very thing, with a series of others that are to follow afterward.

Here, then, is an attempt to induce a court of equity to stop an election,—a political election; to prevent the registration of voters by a decree of a court of equity before any registration is made. The evil lies away beyond that; the evil is not in registering the voters, but in something that the voters are afterward to do, and something that the convention is afterward to do, and something that is to be the result of all these labors. But these things have not yet happened, and counsel propose to begin by asking you to stop the registration of voters. They say they can have no adequate relief against that registration, and the evils that lie beyond, except in a court of equity. They cannot wait until the laws are executed, but they must have relief now. There have been many bills in equity in various States, but who has heard that it was the function of a court of equity to stop an election? What are the consequences of an election? To make officers and invest them with powers. If these officers and these powers are going to invade any rights, they are the rights of other officers legally executing some power. Do we go to a court of equity to be relieved against an officer elected? Take the case of an officer illegally elected at an illegal election. Being so elected, he has no right to intrude upon the legal officer; but that is no case for a court of equity. It is a case for a *quo warranto*.

But these defendants cannot compel the registration. These laws compel no man in Georgia, black or white, to be registered; nor do they authorize the military commander to seize and punish any one for not going to the election. It is left entirely to the citizens to decide for themselves whether they shall be registered or not. You cannot very well stop them. What next? An election is held. Who votes at the election? Just who chooses. How do you know
*60 that anybody is going to attend that election? * How do you know that an election will be ordered, or that, if ordered, Georgia is going to accept the offer made by Congress? The people that the State of Georgia comes here to protect, can protect themselves against all this mischief by not going to the elec-

tion, because the mischief is the election of a government that is going to displace the existing government. But suppose the people go to the election and vote for delegates; the delegates are not obliged to go to the convention; there is no law to punish them for not attending. If they go, they frame a constitution. That is left to themselves. Congress simply says that a certain provision in regard to suffrage must be inserted in the constitution, or it will not be recognized by the legislative department. If the convention cannot agree, there is an end of the whole proceeding; but if they agree and make a constitution containing the stipulation provided for by Congress, the people are then to hold an election to ratify it. If the people ratify it, it will be because they like it. It is left to them to do it or not. If they do it, the next step is to send the constitution to the President, and by him it is to be sent to Congress, and then Congress is to act.

These things all lie in the unknown and unascertained future. As yet, not one of us is so wise as to see into that future and know what is to happen, or whether the mischiefs that opposite counsel see in the distance are ever going to take bodily shape. Counsel must show a controversy with a party, not a controversy with the law; they must show an individual right, not a general public right. This court does not sit as conservators over public rights, and as such to guard them in the very beginning against the execution of an obnoxious law. It sits only in a controversy after a controversy has arisen. If there was no other objection to the case, this would be sufficient, namely, that no controversy has ever arisen under this law with any party, citizen of a State, public officer, or anybody else.

But suppose that the mischiefs which the bill says will be consummated are consummated; suppose that what is proposed to be done is done, and all that
*61 is future and contingent * becomes actual and past, and a constitution is framed under these laws and is accepted and ratified by Congress as the constitution of Georgia, and then an appeal is made to the court not to prevent, but to restore, to keep, to preserve the right of the contesting State organization as the State government of Georgia,—what sort of a question would the court then encounter? The same that it encountered in the Dorr case, *Luther* v. *Borden*.[1] A new constitution formed by the people of a State under the authority of these acts, and an older State constitution formed by the people under due authority, as they alleged,—these two sovereignties at once enter into a contest for supremacy. Is that a sort of controversy which the court can decide as a court of equity? In the first place, the parties will not stop to come to a court; they will settle things by force. The old State government, if it is a legal one, has a right to resist any usurped government that pretends to be the State. If that usurped government brings against it a force that it cannot withstand, what then is its remedy? To come to a court of equity to ask them to enjoin the advance of the hostile force; to say to the commanding general, "You shall stop your march; we hold that you are not the rightful government; this other is?" Certainly not. The Constitution contemplates exactly that state of things. If the existing State government of Georgia, which the opposite counsel represent, is the legal State, it will remain the legal State, notwithstanding these laws. If, as they say, these laws are unconstitutional and void, no authority given under them can ever prejudice the State. Is there no remedy? If the new constitution is supported by an armed force greater than the present government can bring to bear against it, what is the remedy? A court? No; but Congress and the President,—the political power. They are then precisely in the situation pointed out by the Constitution,— a State

[1] 7 Howard, 1.

in insurrection; a lawful State warred upon by an unlawful, unauthorized
*62 body claiming to be a State, using force against force * that the rightful
State cannot overcome. Then comes a case for political interference. Then Congress and the President must decide which of these two is the rightful State; and when they decide it, it is decided for this court and for all; for that is the only tribunal that can decide it.

Messrs. Charles O'Connor, R. J. Walker (with whom were Messrs. Sharkey, Black, Brent, and E. Cowan), contra:

It is said that we have not proper and competent parties. That is a very narrow view of the subject. It is true that the framers of the Constitution do not seem to have been so cautious as to take into their consideration this nice exception that, by possibility, there might be some people living within the district, ten miles square or less, that might be ceded to Congress for the seat of Government, who would not be citizens of any State, and therefore not provided for by this provision. Nor that there ever would be any considerable number of persons in the whole world other than citizens of the menaced State, against which the State would have any cause of complaint that it would desire to redress, except their fellow-citizens of other States of the Union, or strangers who were subject to foreign nations. But they did provide that a State should have a judicial remedy against any individuals who were beyond the reach of its power and process, who might do it an injury, and of course who might menace an injury. This right is given in the Constitution itself. This is the court of first instance into which the State is to come. What is it to have here? All the remedies, surely, for the enforcement of its rights that are usual and customary according to the laws of the parent State, and the existing laws of the Colonies as they were, and the laws of these States during the short period they had existed as States, that were allowed in courts in cases at law or in equity.

The rejection in the convention of the proposition for a council of revision offers no objection to the jurisdiction of the court in this case. This court was not thereby separated from political questions. Not at all. It was sepa-
*63 rated * indeed from any participation, in any shape, in legislation. At least, legislative power was not conferred upon it. The jurisdiction of the court, as a court created under the Constitution, was, of course, intended to apply to all questions with which the court was capable of dealing. The Attorney-General has spoken of a *quo warranto* as being the proper remedy. There can be no *quo warranto* in this court upon the governor of a State for exercising his powers. His is a State office, and a *quo warranto* by the judiciary of a State against its governor would be very much like that so ably condemned, not long since, by Mr. Attorney himself in *Mississippi* v. *Johnson, President,*[1]—a writ issuing out of this court against the Chief Executive.

Much has been said about all the evil alleged in the bill being contingent and future. The argument is, that though the sword is suspended above us, the hair by which it hangs may never break. But we have presented plainly and distinctly, facts that cannot and have not been denied. The President says that he will execute these acts of Congress. General Grant, it is known to all, has issued an order, to the commanders of these various districts, declaring that the acts are to be carried into execution. The minor officers have declared their intention to execute them. Counsel say that the court will not act upon fears and apprehensions. The fact is quite otherwise. A bill *quia timet* is one of the very heads of equity jurisdiction. It must, to be sure, be a stable

[1] 4 Wallace, 475.

and substantial fear; but when the Executive of the United States declares that he will execute a certain set of provisions, when his General-in-Chief declares that he will execute them, when that necessarily involves the bringing into play of the whole military force of the Union against a particular State, shall it be said that the fears are not substantial?

The Attorney-General quite understates the effects of these Reconstruction Acts. Their actual effect is to restrain at once the holding of any election
*64 within the State for any * officers of the present State government by any of the State authorities; to direct all future elections in the State to be held under the direction of, and by officers appointed by, the military commander; and that all persons of certain classes described shall be the electors permitted to vote at such election. It is, therefore, an immediate paralysis of all the authority and power of the State government by military force; a plain setting aside of the present State government, and depriving it of the necessary means of continuing its existence. It is substituting in its place a new government, created under a new constitution, and elected by a new and independent class of electors. What is the effect of this upon the State government and upon the State now existing? The same, just, as if in the case of a private corporation (which could only keep up its existence by regular periodical elections by its stockholders), the persons having an interest in it, the owners of its franchise, and the right to perpetuate it, were forbidden to vote, deprived of the right,—or a large number of them were so forbidden and deprived—and a mass of persons having no right whatever were introduced. This is a direct attack upon the constitution of the corporation in the case supposed—a direct attack upon the constitution and fundamental law of the State in the case before the court.

To grant an injunction in such a case is manifestly within the jurisdiction of equity.[1]

The grievance of which Georgia complains is analagous; a proceeding to divest her of her legally and constitutionally established and guaranteed existence as a body politic and a member of the Union. To explain. By the fundamental law of Georgia, as we know, its constituent body is, and always has been, composed of the "free white male citizens of the State, of the age of twenty-one years, who have paid all taxes which may have been required
*65 of them, and which * they have had an opportunity of paying agreebly to law for the year preceding the election, being citizens of the United States, and having resided six months either in the district or county, and two years within the State."[2]

A State is "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests. It has its rules. It has its rights.[3] A republican State, in every political, legal, constitutional, and juridical sense, as well under the law of nations, as the laws and usages of the mother country, is composed of those persons who, according to its existing constitution or fundamental law, are the constituent body. All other persons within its territory, or socially belonging to its people, as a human society, are subject to its laws, and may justly claim its protection; but they are not, in contemplation of law, any portion of the body politic known and recognized as the State. On principle it must be quite clear that the body politic is composed of those who by the fundamental law are the source of all political power, or

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[1] Ward *v.* The Society of Attorneys, 1 Collyer's New Cases in Chancery, 379; Simpson *v.* Westminster Palace Hotel Company, 8 Clark (House of Lord's Cases), 717; Dodge *v.* Woolsey, 18 Howard, 341.

[2] Constitution of Georgia, 1865, Art. 5, § 1.

[3] Chisholm *v.* Georgia, per Wilson J., 2 Dallas, 45.

official or governmental authority. Dorr's revolutionary government in Rhode Island was an attempted departure from it.[1] In that case the precise thing was done by Dorr and his adherents which these acts in the present instance seek to perform. There was a State government in the hands of a portion of the people of that State constituting its whole electoral body. Dorr was of opinion, and his adherents supported him in it, that a greater number of electors ought to be admitted, and he therefore undertook, by spontaneous meetings, to erect an independent State government. He failed in so doing. The court decided that it was no government, but that the original chartered government which there existed was the legitimate and lawful government, and consequently Dorr failed.

The same reasons would lead to the overthrow of these acts of Congress.

*66 The * State has a right to maintain its constitution or political association. And it is its duty to do what may be necessary to preserve that association. And no external power has a right to interfere with or disturb it.[2] In *Rhode Island* v. *Massachusetts,*[3] this Court says, that the members of the American family [meaning the States] possess ample means of defence under the Constitution, which we hope ages to come will verify." What means of defence under the Constitution is possessed by Georgia, if this suit cannot be maintained?

The change proposed by the two acts of Congress in question is fundamental and vital. The acts seize upon a large portion—whites—of the constituent body and exclude them from acting as members of the State. It violently thrusts into the constituent body, as members thereof, a multitude of individuals—negroes—not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized. This will work a virtual extinction of the existing body politic, and the creation of a new, distinct, and independent body politic, to take its place and enjoy its rights and property. Such new State would be formed, not by the free will or consent of Georgia or her people, nor by the assent or acquiescence of her existing government or magistracy, but by external force. Instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, this is destroying that very government by force. Should this be done, and the magistracy of the new State be placed in possession, the very recognition of them by the Congress and President, who thus set them up, would be a conclusive determination, as between such new government and the State government now existing. This court would be, then, bound to recognize the latter as lawful.[4]

Independently of this principle, the forced acquiescence of the people, under the pressure of military power, would soon work a virtual extinction of the existing political society.

*67 * Each aspect of the case shows that the impending evil will produce consequences fatal to the continuance of the present State, and, consequently, that the injury would be irreparable.

The great objection, of the other side,—viz., that the subject-matter of the bill, the case stated, and the relief sought, are *political in their nature,*—is without force.

Had it been asserted that this court was without political *power,* or without any physical power; that it could not supervise or control action on questions of policy touching the administration of any power of government, internal or external, committed by the Constitution to either or both of the departments

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[1] Vattel's Law of Nations, book 1, ch. 2, § 16; Ib., book 2, ch. 4, § 57.

[2] 12 Peters, 745.

[3] Luther *v.* Borden, 7 Howard, 1.

[4] Ib.

commonly denominated the political departments, the assertion would be correct. But when, under cover of an undefined phrase, it is asserted that this court cannot pronounce upon the validity of an act which may be confessedly at war with the Constitution, repugnant to its whole spirit and intent, and which cannot be brought within the range of any power conferred by the Constitution, or any duty committed by it to any of the departments, the phrase is not correct. Political power cannot, indeed, exist anywhere except under and by force of the Constitution; and whenever it does exist, it must be exercised exclusively by those officers or persons to whom the Constitution has committed it. But whether under the Constitution it exists at all, in a given case, is a question as clearly within the range of judicial cognizance as any other that can arise.

It is untrue that questions of a political nature, according to the vulgar acceptation of that phrase, are unsuited to judicial cognizance. Of course no court can, judicially, investigate or determine *any* question unless parties, between whom it has cognizance, are regularly before it; unless the disputable facts, if any, be susceptible of a judicial trial, and unless the relief sought be judicial in its form and nature: but when these three circumstances concur, the nature of the questions of law or fact never presents any obstacle to the exercise of judicial power.

*68 Thus, the writ of *habeas corpus* is the absolute constitutional * right of the citizen. Upon that writ, from the earliest period at which civil liberty had a place or name, down to *Ex parte Milligan,* in the last published volume of Wallace,[1] the humblest individual has had power to arraign before the judicial magistrate any act of the political departments affecting his imprisonment, and to procure a judicial deliverance from the grasp of any executive officer, however exalted. The judicial power—whether State or Federal—can examine and condemn, as unconstitutional and utterly void, every legislative act and every executive decree which, by its terms, purport, or intent, would debar the prisoner from a discharge to which, in the judgment of the judiciary, he is entitled by the Constitution. So in prize cases, in questions of title to land involving a determination as to the boundaries of States and Territories, foreign or domestic,—questions as completely within the idea of a "subject-matter political in its *nature*" as can be conceived,—are of every-day occurrence in the judicial tribunals.

It is, in short, no impediment in any case that this judicial power may condemn acts of men exercising political power which work a prejudice to the rights of any juridical or natural person suing for justice. If the rights imperilled be of a civil nature, entitled to protection under the principles of the Constitution and capable of being protected by the ordinary operation of known and established judicial remedies, the jurisdiction is perfect.

Such cases do not present *political* questions, in any proper sense. For when the term is employed for any definite purpose in jurisprudence, it means a question which the Constitution, or some valid law, intrusts exclusively to the one or both of the departments, commonly styled political.

II. That a question affecting *political rights* can be the subject of judicial cognizance was decided affirmatively, in the face of the objection now urged, both at the bar and in the hall of conference, in *Rhode Island* v. *Massachusetts*.[2]

*69 The suit brought by Rhode Island was to vindicate the right of jurisdiction * and sovereignty in and over a disputed territory; the kind of question that in other countries begins in diplomacy and ends in a treaty or in war.

[1] 4 Wallace, 4.

[2] 12 Peters, 669.

The great State of Massachusetts vigorously—almost indignantly—repelled the jurisdiction as an assumption of *political* power. She intimated power in her self to resist, and inability by the court to enforce, its judgment.

Mr. Austin, her counsel,[1] said:

"This court has no jurisdiction, because of the nature of the suit. It is in its character political; in the highest degree political; brought by a sovereign, in that avowed character, for the restitution of sovereignty. The judicial power of the United States extends, by the Constitution, only to cases of law and equity. The terms have relation to English jurisprudence. Suits of the present kind are not of the class belonging to law or equity, as administered in England."

This pointed presentation of the question was sustained by the powerful dissent of Taney, C. J. He says:

"In the case before the court, we are called on to protect and enforce the 'mere political jurisdiction' of Rhode Island; and the bill of the complainant, in effect, asks us to 'control the legislature of Massachusetts, and to restrain the exercise of its physical force' within the disputed territory."

The dissent, however, is only a dissent. It has no authoritative force. It only serves, like all dissenting opinions, to prove the distinctness with which the question was presented, and to set out in relief, and to give emphasis and power to the decision of the court. The court maintained the jurisdiction.[2]

Mr. Hazard, for Rhode Island, met and answered the objection. The case did not involve the title to land or to money; nor does the Constitution say a word about boundary in giving jurisdiction over cases between States. It
*70 was a case of disputed sovereignty and jurisdiction over five * thousand people; and the court entertained jurisdiction because of the parties, and pronounced definitive judgment.

The early case of *New York* v. *Connecticut,*[3] and *Pennsylvania* v. *The Wheeling Bridge,*[4] are in accordance with our views.

The Attorney-General places much reliance upon *The Cherokee Nation* v. *The State of Georgia.* The court there held that the Cherokee Nation was not a foreign state in the sense of the Constitution—was not a state that could sue in the courts of the United States, and, therefore, that the court had no jurisdiction, for the want of a proper party to the bill. All beyond that was *obiter dictum.* But what was that case? It was a bill, not against the agents of the State of Georgia, but a bill to restrain the State, as a State in its corporate capacity, from the execution of its laws, and at a time when the State was actually executing them by force. If the present bill was filed against the government of the United States to restrain it, as a government, from executing by force the laws in question, there might be some analogy; but it is not a bill against the government; it is a bill to restrain subordinate officers. The decision in *Marbury* v. *Madison* shows that such a bill is sustainable.

Independently of all this, rights of property are here involved. The bill alleges that more than $5,000,000 of real and personal estate are about to be taken away.

Reply: The cases of *New York* v. *Connecticut,* and *Rhode Island* v. *Massachusetts,* show that the Supreme Court entertains jurisdiction of cases involv-

[1] 12 Peters, 671.
[2] And see Fowler *v.* Lindsey, 3 Dallas, 413.
[3] 3 Dallas, 4. [4] 13 Howard, 579.

ing questions of boundary because a right to land is in dispute. The fact that political consequences were involved was a mere incident. In the latter case the primary object of the bill was, that the northern boundary between Rhode Island and Massachusetts might be ascertained and established, and that the rights of jurisdiction and sovereignty would be ascertained and settled also
*71 was a consequence of this. In the Wheeling Bridge case, the * State of Pennsylvania was granted relief, not because of her political character, but because she was the owner of canals and railroads terminating at Pittsburg, costing her treasury many millions, which it was held would be irreparably injured by the bridge. This bill shows no such case. Property is here a mere accessory or incident, and no injury is threatened to it that equity will enjoin. From beginning to end, there is no ground set out in the bill upon which anything like judicial cognizance can be founded by any power of this court.

The bill having been dismissed at the last term,

Mr. Justice NELSON now delivered the opinion of the court.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *The State of Rhode Island* v. *The State of Massachusetts*.[1] It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance.

This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution.

The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction.[2]

*72 * It has been supposed that the case of *The State of Rhode Island* v. *The State of Massachusetts*[3] is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But, it will be seen on a close examination of the case, that this is a mistake. It involved a question of boundary between the two States. Mr. Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes,[4] "It is said that this is a political, not civil controversy, between the parties; and, so not within the Constitution, or thirteenth section of the Judiciary Act. As it is viewed by the court, on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles River, is the only question that can arise under the charter. Taking the case on the

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[1] 12 Peters, 669.

[2] Nabob of Carnatic *v.* The East India Co., 1 Vesey, Jr., 375–393, S. C., 2 Id., 56–60; Penn *v.* Lord Baltimore, 1 Vesey, 446-7; New York *v.* Connecticut, 4 Dallas, 4-6; The Cherokee Nation *v.* Georgia, 5 Peters, 1, 20, 29, 30, 51, 75; The State of Rhode Island *v.* The State of Massachusetts, 12 Ib., 657, 733, 734, 737, 738.

[3] 12 Peters, 657. [4] Ibid., p. 736.

bill and plea, the question is, whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1642, is the true point from which to run an east and west line as the compact boundary between the States. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or states, of a controversy between them, he observes, "From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law, appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of
*73 national or municipal jurisprudence, as the case requires." * And he might have added, what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign, or state, to a judicial determination, must be one appropriate for the exercise of judicial power; such as a question of boundary, or as in the case of *Penn* v. *Lord Baltimore,* a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of Rhode Island against Massachusetts were that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion.[1] The very elaborate examination of the case by Mr. Justice Baldwin, was devoted to an answer and refutation of these objections. He endeavored to show, and, we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and, that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved; as in this country, where feudal tenures are abolished, in cases of escheat, the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of *The State of Florida* v. *Georgia,*[2] the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The State of Florida was also deeply interested as a proprietor.

The case, bearing most directly on the one before us, is *The Cherokee Nation* v. *The State of Georgia.*[3] A bill was filed in that case and an injunction prayed for, to prevent the execution of certain acts of the legislature of Georgia
*74 within the territory of the Cherokee Nation of Indians, they claiming * a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The acts of the legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians; and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee Nation could not be regarded as a foreign nation within the Judiciary Act; and that, therefore, they had no standing in court. But, Chief

[1] 12 Peters, 752, 754. [2] 17 Howard, 478. [3] 5 Peters, 1.

Justice Marshall, who delivered the opinion of the majority, very strongly intimated, that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "That the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right, might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power, to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one, by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the Judiciary Act, and, competent to bring the suit; but, agreed with the Chief Justice, that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint, would seem to depend for
*75 relief upon * the exercise of political power; and, as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been infringed." And, in another part of the opinion, he returns, again, to this question, and, is still more emphatic in disclaiming jurisdiction. He observes: "I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions.[1]

By the second section of the third article of the Constitution "the judicial power extends to all cases, in law and equity, arising under the Constitution, the laws of the United States," &c., and as applicable to the case in hand, "to controversies between a State and citizens of another State,"—which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree, that the bill filed, presents a case, which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another,

[1] 5 Peters, 29-30.

where the danger, actual or threatened, is irreparable, or the remedy at law
*76 inadequate. But, according to the course of * proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the overthrow of the State as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is, that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the State, which is or may be directed, or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

*77 * That these matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, or corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

It is true, the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and

its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

The CHIEF JUSTICE [Chase]: Without being able to yield my
*78 assent to the grounds stated in the opinion just read for the * dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill, is one of which this court has no jurisdiction.

BILL DISMISSED FOR WANT OF JURISDICTION.

Pacific States Telephone and Telegraph Company v. State of Oregon.

Supreme Court of the United States, 1912.

[*223 United States,* 118.]

The enforcement of the provision in § 4 of Art. IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.

The provisions of § 4 of Art. IV of the Constitution do not authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to Congress.

Under § 4 of Art. IV of the Constitution, it rests with Congress to decide what government is the established one in a State, and its decision is binding on every other department of the Government, and cannot be questioned by the judiciary. *Luther* v. *Borden,* 7 How. 1.

A statute otherwise constitutional cannot be attacked in the courts on the ground that it was adopted in pursuance of provisions in the constitution of the State which render the form of government of the State unrepublican in form within the meaning of § 4 of Art. IV of the Constitution. The courts have no jurisdiction of the question; it is for Congress to determine.

Where the claim that one taxed under a state statute is deprived of property without due process of law is not based on any inherent defect in the law, or infirmity of power of State to levy it, but on the ground that the government of the State is not republican in form, the question is not within the jurisdiction of the courts.

The judicial power of the United States will not be extended so as to interfere with the authority of Congress or of the Executive so as to make the guarantee contained in § 4 of Art. IV of the Constitution one of anarchy instead of order. *Luther* v. *Borden,* 7 How. 1.

Whether the adoption of provisions for the initiative and referendum in the constitution of a State, such as those adopted in Oregon in 1902, so alter the form of government of the State as to make it no longer republican within the meaning of § 4 of Art. IV of
*119 the Constitution, * is a purely political question over which this court has no jurisdiction.

THE facts, which involve the constitutionality under § 4 of Art. IV of the Federal Constitution of the initiative and referendum provisions of the constitution of the State of Oregon, are stated in the opinion. . . .

*133 * Mr. Chief Justice White delivered the opinion of the court.

We premise by saying that while the controversy which this record presents is of much importance, it is not novel. It is important, since it calls upon us to decide whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject. It is not novel, as that question has long since been determined by this court conformably to the practise of the Government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress.

The case is this: In 1902 Oregon amended its constitution (Art. IV, § 1.). This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and house of representatives added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution and to
*134 enact or * reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted when approved by popular vote should become the law of the State. The second, the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters. The full text of the amendment is in the margin.[1]

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[1]Section 1 of Article IV of the constitution of the State of Oregon shall be and hereby is amended to read as follows:

Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding

*135 * In 1903 (Feby. 24, 1903, Gen. Laws 1903, p. 244) detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on and promulgated by the Governor in 1906 (June 25, 1906, Gen. Laws 1907, p. 7) as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, two per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts
*136 as required by the * statute and was accordingly assessed two per cent. upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. Four of these challenged the validity of the tax because of defects inhering in the nature or operation of the tax. The defenses stated in these four paragraphs, however, may be put out of view, as the defendant corporation, on its own motion, was allowed by the court to strike these propositions from its answer. We may also put out of view the defenses raised by the remaining paragraphs based upon the operation and effect of the state constitution as they are concluded by the judgment of the state court. Coming to consider these paragraphs of the answer thus disembarrassed, it is true to say that they all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the State begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it and that judgment was affirmed by the Supreme Court of Oregon. (53 Oregon, 162.) The court sustained the conclusion by it reached, not only for the reasons expressed in its opinion, but by reference to the opinion in a prior case (*Kadderly* v. *Portland,* 44 Oregon, 118, 146), where a like controversy had been determined.

The assignments of error filed on the allowance of the writ of error
*137 are numerous. The entire matters covered * by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as

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the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor. (1 Lord's Oregon Laws, p. 89.)

the result of the provisions of § 4 of Art. IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. Because of their absolute unity we consider all the propositions together, and therefore at once copy them. We observe, however, that in the argument the second, fourth and fifth paragraphs, for the purposes of discussion, were subordinately classified, and these subordinate classifications we omit from our text, reproducing them, however, by a marginal reference.

I.

"The initiative and the tax measure in question are repugnant to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States which forbids a State to deny to any person within its jurisdiction the equal protection of the law.

II.

"The initiative amendment and the tax in question, levied pursuant to a measure, passed by authority of the initiative amendment, violates the
*138 right to a republican * form of government which is guaranteed by section 4, article IV, of the Federal Constitution.

III.

"Taxation by the initiative method violates fundamental rights and is not in accordance with 'the law of the land.' (U. S. Const., Art. VI.)

IV.

"The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union and which the State is bound to maintain.

V.

*139 * "The Federal Constitution presupposes in each State the maintenance of a republican form of government and the existence of state legislatures, to wit: Representative assemblies having the power to make the laws; and that in each State the powers of government will be divided into three departments: a legislature, an executive and a judiciary. One of these, the legislature, is destroyed by the initiative.

VI.

"The provision in the Oregon constitution for direct legislation violates the provisions of the act of Congress admitting Oregon to the Union."

On the surface, the impression might be produced that the first and
*140 third propositions,—the one in words relating * to the equal protection clause of the Fourteenth Amendment, and the other in terms asserting

"taxation by the initiative method violates fundamental rights, and is not in accordance with the law of the land," are addressed to some inherent defect in the tax or infirmity of power to levy it without regard to the guarantee of a republican form of Government. But this is merely superficial, and is at once dispelled by observing that every reason urged to support the two propositions is solely based on § 4 of Art. IV and the consequent inability of the State to impose any tax of any kind which would not violate the Fourteenth Amendment or be repugnant to the law of the land if in such State the initiative or referendum method is permitted. Thus dispelling any mere confusion resulting from forms of expression and considering the substance of things, it is apparent that the second proposition, which rests upon the affirmative assertion that by the adoption of the initiative and referendum the State "violates the right to a republican form of government which is guaranteed by section 4 of Article IV of the Federal Constitution," and the two subdivisions made of that proposition, the first that "the guarantee in question is to the people of the States and to each citizen, as well as to the States as political entities," and the second asserting "section 4 of Article IV therefore prohibits the majority in any State from adopting an unrepublican constitution," are the basic propositions upon which all the others rest. That is to say, all the others and their subdivisions are but inducements tending to show the correctness of the second and fundamental one. This conclusion is certain, as they all but point out the various modes by which the adoption of the initiative and referendum incapacitated the State from performing the duties incumbent upon it as a member of the Union or its obligations towards its citizens, thus causing the State to cease to be a government republican
*141 in form within the intendment of the * constitutional provision relied upon. In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a

*142 court of justice the rightful existence * of the State. Second. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State and if such contention be thought well founded to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the *143 repugnancy of those contentions * to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case —*Luther* v. *Borden*, 7 How. 1.

The case came from a Circuit Court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island and the conflict which was brought about by the effort of the adherents of that alleged government sometimes described as "the government established by a voluntary convention" to overthrow the established charter government. The defendants justified on the ground that the acts done by them charged as a trespass were done under the authority of the charter government during the prevalence of martial law and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government and denied the legality of the charter government. In the course of the trial the plaintiffs to support the contention of the illegality of the charter government and the legality of the voluntary government "although that government never was able to exercise any authority in the State nor to com-

mand obedience to its laws or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern have been ratified by a large majority of the male people of the State of the age of 21 years and upwards and also by a
*144 large * majority of those who were entitled to vote for general officers cast in favor of a constitution" which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the State of Rhode Island. The Circuit Court rejected this evidence and instructed the jury that as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set aside the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining such established government. On this subject it was said (p. 38):

"For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time, were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals."

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy in fact of the charter government, and had refused to investigate the legality of the
*145 * voluntary government for the purpose of decreeing the established government to be illegal, on the ground (p. 39) "that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses, etc." It was further remarked:

"This doctrine is clearly and forcibly stated in the opinion of the supreme court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority."

Reviewing the grounds upon which these doctrines proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, and from a point of view of the state law the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts, in the light of § 4 of Art. IV, of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was, in substantial effect, thus pressed in argument: The ultimate power of sovereignty is in the people, and they in the nature of things, if the government is a free one, must have a right to change

their constitution. Where in the ordinary course no other means exists of doing so, that right of necessity embraces the power to resort to revolution. As, however, no such right it was urged could exist under the Constitution, because of the provision of § 4 of Art. IV, protecting each state on application of the legislature or of the executive, when the legislature cannot be convened, against domestic violence, it followed that the guarantee of a government republican
*146 in form * was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular State hopeless in case of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of the charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of § 4 of Art. IV, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a State could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this it pointed out that owing to the inherent political character of such a question its decision was not by the Constitution vested in the judicial department of the Government, but was on the contrary exclusively committed to the legislative department by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

*147 * "Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the constitution it rests with congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other

department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Pointing out that Congress, by the act of February 28, 1795 (1 Stat. 424, c. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States,

*148 * on the application of the legislature of a State or of the Governor, to call out the militia of any other State or States to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of § 4 of Art. IV was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the delegation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at naught his action; and the pertinent statement was made (p. 43): "If the judicial power extends so far, the guarantee contained in the constitution of the United States is a guarantee of anarchy, and not of order."

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney in the case which we have thus reviewed, have never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor* v. *Beckham, No. 1,* 178 U. S. 548, where, after disposing of a contention made concerning the Fourteenth Amendment and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guarantee of § 4 of Art. IV, it was said (p. 578):

*149 "But it is said that the Fourteenth Amendment must be * read with section 4 of article IV of the Constitution, providing that: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in state affairs,' and received in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the General Assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before

us was granted under § 709 of the Revised Statutes to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

"It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther* v. *Borden, 7* How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it. . . ."

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction
*150 which the doctrine just * stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of
*151 power assailed, on the ground that its exertion has injuriously * affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

Martin, Heir-at-law and Devisee of Fairfax, v. Hunter's Lessee.

Supreme Court of the United States, 1816.

[1 *Wheaton*, 304.]

The appellate jurisdiction of the supreme court of the United States extends to a final Judgment or decree, in any suit in the highest court of law or equity of a state; where is drawn in question the validity of a treaty, or statute of, or an authority exercised
*305 under, the United * States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or the construction of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission.

Such judgment or decree may be reexamined by writ of error in the same manner as if rendered in a circuit court.

If the cause has been once remanded before, and the state court decline or refuse to carry into effect the mandate of the supreme court thereon, this court will proceed to a final decision of the same, and award execution thereon.

If the validity or construction of a treaty of the United States be drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself.

The return of a copy of the record, under the seal of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case.

It need not appear that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act. . . .

In *Fairfax's Devisee* v. *Hunter's Lessee* (7 Cranch 603), decided in 1813, the Supreme Court held that Lord Fairfax, at his death in December 1781, held absolute property, seisin and possession of the waste and unappropriated lands in the northern neck of Virginia; that his devise of the whole of his lands in the northern neck to Denny Fairfax, a British subject, passed these lands to be held by the devisee until divested by an inquest of office, perfected by entry and seizure where the possession was not vacant; that no inquest of office was ever made; that the title of the devisee was not divested, as it might have been, by office found and possession taken of the lands by Virginia; that title not being vested in Virginia, its grant of title to Hunter in 1789 could not be of an actual but only of an inchoate and imperfect title to be consummated by an actual entry under an inquest of office or its equivalent, a suit and judgment at law by Hunter as grantee, inasmuch as Hunter could not take a better title than that of Virginia, his grantor; that, even if a correct interpretation of articles 4 and 5 of the treaty of peace of September 3, 1783, did not protect the devisee, Article 9 of the Jay treaty, concluded November 19, 1794, did, by which "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty,

shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

The judgment of the district court of Winchester was in favor of the alien devisee—a judgment reversed by the court of appeals. Under these circumstances a writ of error issued out of the Supreme Court to the Court of Appeals in accordance with section 25 of the judiciary act of 1789, allowing such writ and a transfer of the case, where a provision of the Constitution, law of the United States or treaty is involved and the decision is adverse to the validity thereof, to the Supreme Court for reëxamination, reversal, or affirmation; and investing the Supreme Court with power to remand the cause for a final decision, or, if once remanded, to proceed to final decision and award execution. Under this writ of error and under these circumstances the Supreme Court issued its mandate in *Fairfax's Devisee* v. *Hunter's Lessee* (7 Cranch, 603), requiring the judgment of the Court of Appeals of Virginia to be reversed. The Court of Appeals failed to do so, under the circumstances set forth in the present case, reëxamined and decided by the Supreme Court upon the present writ of error.[1]

March 20th, 1816. STORY, J., delivered the opinion of the court.

*323 * This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme

*324 court to this court, is not in pursuance of the constitution of the * United States; that the writ of error, in this cause, was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice,* in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose

[1] The above statement of the case is substituted for that of the original report.—Editor.

of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general govern-
*325 ment * with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or *to the people*."

*326 * The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself.

Hence its powers are expressed in general terms, leaving to the legis-

*327 lature, from time to * time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The 1st. section declares, "the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the congress may, from time to time, ordain and establish." The 2d section declares, that "the judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects." It then proceeds to declare, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have *328 *original jurisdiction.* * In all the other cases before mentioned the supreme court shall have *appellate jurisdiction,* both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? "The judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall,* at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." Could congress create or limit any other *329 tenure of * the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions: it must be in the negative. The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second, to approve and execute them,

and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must, therefore, be vested in some court, by congress; and to suppose, that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose, that, under the sanction of the constitution, they might defeat the constitution itself; a construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be
*330 vested? The second article declares that "the * executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a supreme court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist. The supreme court can have original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by
*331 * itself: and if in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power *"shall be vested,"* would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial

power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are "the *judicial power* shall extend," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion, that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to
*332 powers already granted; for the American *people* * had not made any previous grant. The constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, &c., that the supreme court *shall have* original jurisdiction." Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds—"in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." The very exception here shows that the framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power
*333 to regulate the appellate jurisdiction, if the language were * only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the constitution itself. The judicial power shall extend to all cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore,

extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases (if any) is this judicial power exclusive, or exclusive at the election of congress? It will be observed that there are two classes of
*334 cases enumerated * in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to *all cases;* but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped, seemingly *ex industria.* Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases;* and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the constitution, laws, and treaties of the United
*335 States. Here the state courts * could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power should extend
*336 * to all controversies to which the United States should be a party, yet

this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject matter; in the second, it is made materially to depend upon the value in controversy.

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction. But there is, certainly, vast weight in the argument which has been urged, that the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other
*337 prevail, it is manifest that the judicial power of the * United States is unavoidedly, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

But, even admitting that the language of the constitution is not mandatory, and that congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not
*338 exclusively to be decided by way of original * jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And

as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals, in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend *to all cases,*" &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the *case,* then, and not *the court,* that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If
*339 the * text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the constitution, laws, and treaties of the United States, or *to all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all,* but to *some,* cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress, to establish or not to establish, inferior courts at their own
*340 pleasure, and * congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary juris-

diction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide
*341 merely * according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no state shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached,
*342 have a * right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of

the United States must, in such cases, extend to state tribunals; and if, in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts
*343 is inconsistent with the genius * of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in
*344 some * respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restric-
*345 tion * which is not to be found in the terms in which it is given. From the

very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish "courts for revising and determining, finally, *appeals* in all cases of captures." It is remarkable, that no power was given to entertain *original* jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted, and our national peace be endangered. Under the present constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of state courts, if they
*346 should assert jurisdiction over prize causes, cannot be less * important, or less useful, than it was under the confederation.

In this connextion we are led again to the construction of the words of the constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory
*347 of its own, and given or withheld * powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or

control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even
*348 necessity of *uniformity* of decisions * throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may
*349 always elect the state court, the defendant * may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The exist-

ence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the pos-
*350 session of another court, * and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist, after judgment. And if the appellate power by the constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the
*351 * state decisions would be paramount to the constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardise private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings,

both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the
*352 friends and by the opponents of that system. It * is an historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued, is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this court may rightfully sustain the present writ of error? This section, stripped, of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree, in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or of the constitution, or of a treaty or statute of, or commission held
*353 under, the United * States, and *the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such* clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States, upon a writ of error, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, *except that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.* But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, *than such as appears upon the face of the record, and immediately respects the before-mentioned question* of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, there-

*354 fore, equivalent to a perpetual stay of proceedings upon * the mandate, and a perpetual denial of all the rights acquired under it. The case, then, falls directly within the terms of the act. It is a final judgment in a suit in a state court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate, and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment.

In our opinion, no legal distinction exists between the cases. . . .

*362 * It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

JOHNSON, J. It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

In this view I acquiesce in their opinion, but not altogether in the reasoning, or opinion, of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way. . . .[1]

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[1] In Tennessee *v.* Davis (100 U. S. 257), decided in 1879, the Supreme Court held, relying upon Justice Story's opinion in the principal case, that a criminal case begun in a State court against an official of the United States for an act committed in the performance of his duty, might be transferred to the United States Circuit Court at its next session within the State where the alleged offense was committed.

By an act of Congress approved December 23, 1914, it was provided that "It shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States." (38 Stat. L. pt. i, p. 790.)

The reason for this act, amending Section 237 of the Judiciary Act approved March 3, 1911, is thus stated by Senator Root, advocating this change at a hearing of the Judiciary Committee of the House of Representatives, February 27, 1914:

> As section 237 now stands, when, in a state court, there has been a claim of right or immunity under the Constitution or laws or treaties of the United States, and the decision is against the claim, there can be a writ of error to the Supreme Court.
>
> There have been some cases in which the decisions of the courts of last resort in states have been in favor of the claim, giving to the provisions of the Federal Constitution an effect which many people think the Supreme Court would not give to those cases. (Elihu Root, *Addresses on Government and Citizenship*, p. 475.)—Editor.

Cohens v. State of Virginia.

Supreme Court of the United States, 1821.

[6 *Wheaton,* 264]

This Court has, constitutionally, appellate jurisdiction under the judiciary act of 1789, c. 20. s. 25. from the final judgment or decree of the highest Court of law or equity of a State, having jurisdiction of the subject matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity: or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute, or commission.

It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a State, and the other a citizen of that State.

*265 * The act of Congress of the 4th of May, 1812, entitled, "an act further to amend the charter of the city of Washington," which provides, (s. 6.) that the Corporation of the city shall be empowered, for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the Corporation to force the sale of the tickets in such lottery, in a State where such sale may be prohibited by the State laws.

This was a writ of error to the Quarterly Session Court for the borough of Norfolk, in the State of Virginia, under the 25th section of the judiciary act of 1789, c. 20, it being the highest Court of law or equity of that State having jurisdiction of the case. . . .

*375 * March 3d, 1821. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered in the Court of Husting for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the Legislature of Virginia. In the State Court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of Assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words: "If upon this case the Court shall be of opinion that the acts of Congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants: And if the Court should be of opinion that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

*376 * Judgment was rendered against the defendants; and the Court in which it was rendered being the highest Court of the State in which the cause was cognizable, the record has been brought into this Court by writ of error.[1]

[1] The plaintiff in error prayed an appeal from the judgment of the Court of Hustings, but it was refused, on the ground there was no higher State tribunal which could take cognizance of the case.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are—

1st. That a State is a defendant.

2d. That no writ of error lies from this Court to a State Court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject matter of the case. The counsel who followed him said, that jurisdiction was not given by the judiciary act. The Court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this Court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State Court, because neither the constitution nor any law of the United States has been violated by that judgment.

*377 The questions presented to the Court by the two * first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department.

*378 * 1st. The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," and "between a State and foreign States, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are
*379 capable * of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United
*380 States, it follows that those who would withdraw * any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question, whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience, that this union cannot exist without a government for the whole; and they have been taught by the same experience that this

government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by ex-
*381 perience, * the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding." This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings
*382 of liberty to themselves and their posterity." * With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this
*383 general grant, an exception of those cases in which a State may be a * party?

Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal Courts is extended, in consequence of the character of the parties. In that enumeration, we find "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens or subjects."

One of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. The mere circumstance, that a State is a party, gives judisdiction to the Court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our consti-
*384 tution thought it necessary for the purposes of justice, to provide a * tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a State is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an
*385 argument * in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the

Courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a *veto* on the will of the whole.

The answer which has been given to this argument, does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the State institutions; and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

*386 We readily concur with the counsel for the defendant, * in the declaration, that the cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; but we cannot help believing, that a general conviction of the total incapacity of the government to protect itself and its laws in such cases, would contribute in no inconsiderable degree to their occurrence.

Let it be admitted, that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different States may entertain different opinions on the true construction of the constitutional powers of Congress. We know, that at one time, the assumption of the debts contracted by the several States, during the war of our revolution, was deemed unconstitutional by some of them. We know, too, that at other times, certain taxes, imposed by Congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert, that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States, the judges are dependent

*387 for office and * for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of Congress, may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final!

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined

to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a
*388 government should repose on its * own Courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of a new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of State governments. But, ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

*389 * The counsel for Virginia endeavor to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the States can put an end to the government by refusing to act. They have only not to elect Senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is
*390 no sound argument in support of its constitutional * inability to preserve itself against a section of the nation acting in opposition to the general will.

It is true, that if all the States, or a majority of them, refuse to elect Senators, the legislative powers of the Union will be suspended. But if any one State shall refuse to elect them, the Senate will not on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State whose tendency might be to arrest the execution of the laws and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal Courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last.

*391 * This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this Court could not establish the demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings

*392 * instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the Court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judi-

cial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among
*393 those in which jurisdiction must be exercised in the appellate * form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first
*394 class * those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations. That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form, is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such a manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are in-

troduced. This observation is not made, for the purpose of contending, that the legislature may "apportion the judicial power between the Supreme and inferior Courts according to its will." That would be, as was said by this Court in the case of *Marbury* v. *Madison,* to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore,
*395 be the true construction of the article. * But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a State is a party, the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court.

*396 The constitution defines the jurisdiction of the * Supreme Court, but does not define that of the inferior Courts. Can it be affirmed, that a State might not sue the citizen of another State in a Circuit Court? Should the Circuit Court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the State, might not its decision be revised in the Supreme Court? The argument is, that it could not; and the very clause which is urged to prove, that the Circuit Court could give no judgment in the case, is also urged to prove, that its judgment is irreversible. A supervising Court, whose peculiar province it is to correct the errors of an inferior Court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising Court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the Court is declared to be original, "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held, that the State Courts have a concurrent jurisdiction with the federal Courts, in cases to which the judicial power is extended unless the jurisdiction of the federal Courts be rendered ex-

*397 clusive * by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a State Court, and that Court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this Court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other Courts than this, in a particular case, would have the effect of excluding the jurisdiction of this Court in that very case, if the suit were to be brought in another Court, and that Court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other Court, nor suspend its proceedings: for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our Prize Courts, the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this Court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is *398 most * clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different Court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided Courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted, which will consist with its words, and promote its general intention. The Court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not *399 be * instituted in a federal Court. Of the last description, is every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this Court cannot be enlarged,

but its appellate jurisdiction may be exercised in every case cognisable under the third article of the constitution, in the federal Courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury* v. *Madison.*

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other prin-
*400 ciples which may serve to illustrate it, are considered * in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury* v. *Madison,* the single question before the Court, so far as that case can be applied to this, was, whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the Court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The Court says, that such a construction would render the clause, dividing the jurisdiction of the Court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case, (in the case of *Marbury* v. *Madison,*) a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the Court, "that any
*401 clause in the constitution is intended to be without * effect; and, therefore, such a construction is inadmissible, unless the words require it."

The whole reasoning of the Court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the Court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such

operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the Court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

To this construction, the Court cannot give assent. The general expressions in the case of *Marbury* v. *Madison* must be understood with the limitations
*402 which are given to them in this opinion; limitations * which in no degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument, put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the Court.

Were a State to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this Court against such State, to recover back the money?

Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration.

The citizen who has paid his money to his State, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the constitution, than to refuse to comply with any other; and as the federal Courts never had jurisdiction over contracts between a State and its citizens, they may have none over this. But let us so vary the supposed case, as to give it a real resemblance to that under consideration. Suppose, a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the Court gives
*403 judgment against him. This would be a case arising under * the constitution, and would be the very case now before the Court.

We are also asked, if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property?

If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a State, the argument does not assume, that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land, for that which the treaty secures to him, not against the State for money which is not secured to him.

The case of a State which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The Courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal Courts have no cognizance of the case. But suppose a State to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit: suppose a State to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and, unless the juris-

*404 diction of this Court might be exercised over it, the constitution would * be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated without giving jurisdiction to this Court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a State of a patent of nobility. The Court, he says, cannot annul this grant.

*405 * This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the Courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a *case* in law or equity," arising under the constitution, to which the judicial power does not extend.

We think, then, that, as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall

*406 not be construed to extend to any * suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instru-

ment. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in
*407 those * cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual, in the Courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, and so strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation.

The words of the amendment appear to the Court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, &c."

What is a suit? We understand it to be prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained
*408 are a diversity of suits and actions, which are defined by the * Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, *'jus prosequendi in judicio quod alicui debetur.'*" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had

been commenced in the Supreme Court against some of the States before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the State legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced,
*409 or which, if already commenced, may be * prosecuted against a State by the citizen of another State. If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

A writ of error is defined to be, a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another Court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to any thing, it may be released by the name of an action. In *Bacon's Abridgment, tit. Error,* L it is laid down, that "where by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on *Littleton* and in his *Reports*. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of
*410 any thing which is withheld * from him, not when its operation is entirely defensive.

This rule will apply to writs of error from the Courts of the United States, as well as to those writs in England.

Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given

rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a *411 single point of law, and not the whole case, is to * be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another Court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of Court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. *412 The universally received opinion is, that no suit can be commenced * or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations have uniformly issued for the removal of judgments in favour of the United States into a superior Court, where they have, like those in favour of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.

It is, then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another State or by a citizen or subject of any foreign State." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

*413 * 2d. The second objection to the jurisdiction of the Court is, that its appellate power cannot be exercised, in any case, over the judgment of a State Court. This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and

their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it in any respect whatever, than the Court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State Courts, with that constitutional relation which subsists between the government of the Union and the government of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the
*414 same people. In * many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?
*415 We think it is not. We think that in a government * acknoweldgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal Courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the State tribunals. If the federal and State Courts have concurrent jurisdiction in all cases arising

under the constitution, laws, and treaties of the United States; and if a case of this description brought in a State Court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the State Courts, however they may be constituted. "Thirteen independent Courts," says a very celebrated statesman (and we have now more than twenty such Courts) "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in govern-
*416 ment, from * which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and State governments, from construing the words of the constitution, defending the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided. In expounding them, we may be permitted to take into view those considerations to which Courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving
*417 efficacy * to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

Previous to the adoption of the confederation, Congress established Courts which received appeals in prize causes decided in the Courts of the respective States. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the States. These Courts did exercise appellate jurisdiction over those cases decided in the State Courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power "of establishing Courts for receiving and determining finally appeals in all cases of captures."

This power was uniformly construed to authorize those Courts to receive appeals from the sentences of State Courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and State governments was much weaker, much more lax, under the confederation, than under the present

constitution; and the States being much more completely sovereign, their institutions were much more independent.

*418 The convention which framed the constitution, on * turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the State Courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States; and in a subsequent clause declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State Court, on the constitution, laws or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having being [been] published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration

*419 where they * frankly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power, the *Federalist* says, "Here another question occurs: what relation would subsist between the national and State Courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal Courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local Courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeable to the remark already made, the National and State systems are to be regarded as ONE WHOLE.

The Courts of the latter will of course be natural auxiliaries to the execu-

*420 tion * of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the Courts of the Union. To confine, therefore, the general expression which give

appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal Courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this Court on the point now under consideration, have been assented to, with a single exception, by the Courts of every State in the Union whose judgments have been revised. It has been the unwel-
*421 come * duty of this tribunal to reverse the judgments of many State Courts, in cases in which the strongest State feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms, the idea already noticed, that the federal and State Courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this Court can correct the errors of the Courts of Virginia, he says, it makes then Courts of the United States, or becomes itself a part of the judiciary of Virginia.

But, it has been already shown that neither of these consequences necessarily follows: The American people may certainly give to a national tribunal a supervising power over those judgments of the State Courts, which may conflict with the constitution, laws, or treaties, of the United States, without converting them into federal Courts, or converting the national into a State tribunal. The
*422 one Court * still derives its authority from the State, the other still derives its authority from the nation.

If it shall be established, he says, that this Court has appellate jurisdiction over the State Courts in all cases enumerated in the 3d article of the constitution, a complete consolidation of the States, so far as respects judicial power is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the States, so far as respects the judicial power," would authorize the legislature to confer on the federal Courts appellate jurisdiction from the State Courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the Court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let
*423 the nature and objects of * our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case.

The cause was argued in the State Court, on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of Congress by which the City of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the Court the questions, whether the act of Congress be valid? whether, on its just construction, it constitutes a bar to the prosecution? and, whether the act of Assembly, on which the prosecution is founded, be not itself invalid? The questions were decided against the operation of the act of Congress, and in favour of the operation of the act of the State.

*424 * If the 25th section of the judiciary act be inspected, it will at once be perceived, that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form, founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of Congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article.

In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such District as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union: for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that

"This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend
*425 that acts of Congress, made in pursuance of * this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that Congress, when legislating for the District, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this Court. It is, they say, a Court of common law and a Court of equity. Its character, when sitting as a Court of common law, is as distinct from its character when sitting as a Court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one Court may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a Court of law are so totally unlike the forms of proceedings in a Court of equity, that a mere inspection of the record gives decisive information of the character in which the Court sits, and
*426 consequently of the extent of its powers. But * if the forms of proceeding were precisely the same, and the Court the same, the distinction would disappear.

Since Congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this District, is a similar power in forts, arsenals, dock yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers.

The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered.

*427 * Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts when exercising its powers of exclusive legislation.

If Congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other Court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body?

Were any one State of the Union to pass a law for trying a criminal in a Court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental
*428 power may be exercised * throughout the Union, because the principal power is given to that body as the legislature of the Union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock yard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c. he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c.

It is clear, that Congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony. It is equally clear, that a State legislature, the State of Maryland for example, cannot punish those who, in another State, conceal a felony committed in Maryland. How, then, is it that Congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

The solution, and the only solution of the difficulty, is, that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incidence, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle
*429 would apply to them as to other local * legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the District or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive

legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of Congress directs, that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties," &c.

The whole merits of this case, then, consist in the construction of the
*430 constitution and the act of Congress. * The jurisdiction of the Court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.

The counsel for the State of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of Congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both; and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the Court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the Court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

Osborn and Others, Appellants, v. The President, Directors and Company of the Bank of the United States, Respondents.

Supreme Court of the United States, 1824.

[9 *Wheaton,* 738.]

The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank.

This provision in the charter is warranted by the 3d article of the Constitution, which declares, that "the judicial power shall extend to *all cases,* in law and equity, arising under this Constitution, *the laws of the United States,* and treaties made, or which shall be made, under their authority." . . .

*739 * The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and, as the State itself cannot, according to the 11th amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws.

A State cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the Bank, may be restrained by injunction from the Circuit Court.

APPEAL from the Circuit Court of Ohio.

The bill filed in this cause, was exhibited in the Court below, at September term, 1819, in the name of the respondents, and signed by solicitors of the Court,

praying an injunction to restrain Ralph Osborn, Auditor of the State of
*740 Ohio, * from proceeding against the complainants, under an act of the Legislature of that State, passed February the 8th, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this State, without being allowed to do so by the laws thereof."

This act, after reciting that the Bank of the United States pursued its operations contrary to a law of the State, enacted, that if, after the 1st day of the following September, the said Bank, or any other, should continue to transact business in the State, it should be liable to an annual tax of $50,000 on each office of discount and deposit. And that on the 15th day of September, the Auditor should charge such tax to the Bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, who should enter the banking house, and demand the same, and if payment should not be made, should levy the amount on the money or other goods of the Bank, the money to be retained, and the goods to be sold, as if taken on a *fi. fa.* If no effects should be found in the banking room, the person having the warrant was authorized to go into every room, vault, &c. and to open every chest, &c. in search of what might satisfy his warrant.

The bill, after reciting this act, stated, that Ralph Osborn is the Auditor, and gives out, &c. that he will execute the said act. It was exhibited in open Court, on the 14th of September, and notice of the application having been given
*741 to the defendant, * Osborn, an order was made, awarding the injunction on the execution of bonds and security in the sum of $100,000; after which a subpœna was issued, on which the order that had been made for the injunction was indorsed by the solicitors for the plaintiffs; and a memorandum, that bond with security had been given by the plaintiffs, was endorsed by the clerk; and a power to James M'Dowell to serve the same, was indorsed by the Marshal. It appeared, from the affidavit of M'Dowell, that both the subpœna and indorsement were served on R. Osborn, early in the morning of the 15th. On the 18th of the same month of September, a writ of injunction was issued on the same bill, which was served on R. Osborn and on John L. Harper. The affidavit of M'Dowell stated, that he served the writ on Harper, while on his way to Columbus, with the money and funds on which the same were to operate, as he understood; and that the writ was served on Osborn, before Harper reached Columbus.

In September, 1820, leave was given to file a supplemental and amended bill, and to make new parties.

The amended bill charges, that, subsequent to the service of the subpœna and injunction, to wit, on the 17th of September, 1819, J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the Bank, at Chilicothe, and took therefrom $100,000, in specie and bank notes, belonging to, or in deposit
*742 with, the plaintiffs. That this money * was delivered to H. M. Curry, who was then Treasurer of the State, or to the defendant, Osborn, both of whom had notice of the illegal seizure, and paid no consideration for the amount, but received it to keep it on safe deposit. That Curry did keep the same until he delivered it over to one S. Sullivan, his successor as Treasurer. That

neither Curry nor Sullivan held the said money in their character as Treasurer, but as individuals. The bill prayed, that the said H. M. Curry, late Treasurer, S. Sullivan, the present Treasurer, and R. Osborn, in their official and private characters, and the said J. L. Harper, may be made defendants; that they may make discovery, and may be enjoined from using or paying away the coin or notes taken from the Bank, may be decreed to restore the same, and may be enjoined from proceeding further under the said act.

The defendant, Curry, filed his answer, admitting that the defendant, Harper, delivered to him, about the 20th of September, 1819, the sum of $98,000, which, he was informed and believed, was a tax levied of the Branch Bank of the United States. He passed this sum to the credit of the State, as revenue; but, in fact, kept it separate from other moneys, until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives; soon after which he resigned his office, and the moneys and bank notes, in the bill mentioned, still separate from other moneys in the treas-
*743 ury, came to the hands of S. Sullivan, the * present Treasurer, who gave a receipt for the same.

The defendant, Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. He then filed his answer, and was discharged.

This answer denies all personal knowledge of the levying, collecting, and paying over, the money in the bill mentioned. It admits that he was appointed Treasurer, as successor to Curry, on the 17th of February, 1820, and that he entered the Treasury on the 23d, and began an examination of the funds, among, which he found the sum of $98,000, which he understood was the same that is charged in the bill; but this was not a fact within his own knowledge. He gave a receipt as Treasurer, and the money has remained in his hands, as Treasurer, and not otherwise. The sum of $98,000 remained untouched, out of respect to an injunction said to have been allowed by the Circuit Court, on a bill since dismissed. He admits the sum in his hands to correspond with the description in the bill, so far as that description went, and annexes to his answer a description of the residue. He has no private individual interest in the money, and holds it only as State Treasurer; admits notices, from general report, and from the late Treasurer, that the said sum of $98,000 was levied as a tax from the Bank, and that the Bank alleged it to be illegal and void.

The cause came on to be heard upon these answers, and upon the decrees *nisi* against Osborn and Harper, and the Court pronounced a de-
*744 cree * directing them to restore to the Bank the sum of $100,000, with interest on $19,830 the amount of specie in the hands of Sullivan. The cause was then brought, by appeal, to this Court. . . .

*816 * March 19th, 1824. Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction by deciding on the rights of the parties.

*817 * The appellants contest the jurisdiction of the Court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are that the Bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court, in the *Bank of the United States* v. *Deveaux,* (5 Cranch, 85.) In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may "sue and be sued," &c. "in Courts of record, or any other place whatsoever." The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a

*818 general capacity to sue, not a particular privilege to sue in the * Courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same act, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any Court of record of the United States, or either of them." The express grant of jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of

*819 construing every such law. All governments * which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States* v. *Osborn and others,* is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

*820 If this were sufficient to withdraw a case from * the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence are sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which the original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of

*821 the inferior Courts is excluded * by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say, that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Court original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend
*822 on several questions of fact and law. Some * of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy
*823 of an appeal, upon an insulated point, after it has * received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the Bank. When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This
*824 depends on a * law of the United States. The next question is, has this

being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question which the case involved, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is
*825 * compelled, in every case, to show its validity. The case arises emphatically under the law; the act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the Bank a right to sue in the Circuit Courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the Courts of the United States. The Postmaster-General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal Courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the Courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the Bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a
*826 contract authorized by a law of the United States. It depends absolutely * on that law, and cannot exist a moment without its authority.

If it be said, that a suit brought by the Bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or non assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the

Postmaster-General to sue in the Courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, nor establish the position, that the case does not arise under a law of the United States.

*827 It is said, that a clear distinction exists between * the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of law, a right to sue in the Courts of the United States, as give that right to the Bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the

*828 same circumstances under which a native might sue. He is * distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction; the law makes none.

There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

We will now proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous—

1. Because no authority is shown in the record, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill, does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

*829 5. Because, the case made in the bill does not * warrant the interference of a Court of Chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made. . . .

*846 * 6. We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the Bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the Court to restrain the officers of the State from executing the law. It is, then, a controversy between the Bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps

*847 no decree ought to have been pronounced in the cause, until the * State was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.

Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the ex-

ecution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer,
*848 may all be inhibited, under ruinous * penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the Bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a Bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the
*849 penalty acts under a void authority, and the power * to restrain him is denied as positively in the one as in the other.

The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the Courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws?

The State of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agents; of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the 11th amendment of the constitution.

That the Courts of the Union cannot entertain a suit brought against a State, by an alien, or the citizen of another State, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a
*850 State, in the sense of the constitution? * The 11th amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a State shall be a party."

The words of the 11th amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign State."

The Bank of the United States contends, that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit, that the jurisdiction of the Court is not ousted by any incidental or consequential interest, which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State, through its officers.

*851 * If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the Court will not review those decisions, because it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the Courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

The first in the enumeration, is a controversy between two or more States. There are not many questions in which a State would be supposed to take a deeper or more immediate interest, than in those which decide on the extent of her territory. Yet the constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless.

*852 The grant of it certainly proves, that the constitution * does not consider the State as a party in such a case.

Jurisdiction is expressly granted, in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the court takes jurisdiction for that reason. Still, the right of the State to grant, is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the constitution will be construed to forbid the Circuit Courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

We are aware, that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the Court, where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show, that the framers of the constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the constitution given, by which
*853 this interest * is to be measured? If no rule be given, is it to be settled by the Court? If so, the curious anomaly is presented, of a Court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made, without the exercise of jurisdiction?

The next in the enumeration, is a controversy between a State and the citizens of another State.

Can this case arise, if the State be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New-York and New-Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal Court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judg-
*854 ment of a Court of * competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State, in the hands of its officer. And yet the argument admits, that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the
*855 person of his secretary, * or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

*856 Suits brought by the Postmaster-General are * for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the Courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the Court jurisdiction over them, as being cases arising under a law of the United States.

The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided, that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the federal Courts could be ousted by the fact, that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why,
*857 then, is it universally admitted, that this interest in * no manner affects the jurisdiction of the Court? The plain and obvious answer is, because

the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record.

Were a State to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the Court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the Courts of the Union, was the sole legatee. Yet, in such a case, the Court would decide directly and immediately on the interest of the State.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The
*858 amendment has its full effect, if the constitution be construed as it * would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the State for the money taken out of the Bank, was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is, to its being enforced against the specific article taken, and by the decree of this Court. But, it has been shown, we think, that an action of detinue might be maintained for that article, if the Bank had possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the Bank against the individual in possession of it. The judgment in such as suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a dis-
*859 covery, justified the application to a Court of equity. It was in a * Court of equity alone that the relief would be real, substantial and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

This point was argued with great ability, and decided by this Court, after mature and deliberate consideration, in the case of *M'Culloch* v. *The State of Maryland*. . . .

*867 * Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of *M'Culloch* against *The State* *868 * *of Maryland,* and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self respect, to pretend, that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being then shown, we think, conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the constitution, the State being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the Court in pronouncing a decree against the defendants? That this question is attended with great difficulty, has not been concealed or denied. But when we reflect, that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the Bank; that the defendant, *Currie,* is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the Bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, *869 by itself, as a deposit, to await * the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted, that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the Court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the Bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrongdoer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the Bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a Court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issued to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging

to another, from transferring it. The suit, then, might be as well sustained
*870 in a * Court of equity as in a Court of law, and the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt* v. *Gelston,* in the case of *The Appollon,* and in the case of *Doddridge's Lessee* v. *Thompson and Wright,* and in many others. An independent foreign sovereign cannot be sued, and does not appear in Court. But a friend of the Court comes in, and, by suggestion, gives it to understand, that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined, that a State law imposing a tax on the Bank of the United States, was unconstitutional and void, before the wrong was committed for which this suit was brought.

*871 We think, then, that there is no error in the decree * of the Circuit Court for the district of Ohio, so far as it directs restitution of the specific sum of $98,000, which was taken out of the Bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of $2000 by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said $98,000, it being the opinion of this Court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of $98,000 and $2000; and reversed as to the residue.

Mr. Justice JOHNSON. The argument in this cause presents three questions: 1. Has Congress granted to the Bank of the United States, an unlimited right of suing in the Courts of the United States? 2. Could Congress constitutionally grant such a right? 3. Has the power of the Court been legally and constitutionally exercised in this suit? . . .

*903 * Upon the whole, I feel compelled to dissent from the Court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause.

Decree affirmed, except as to interest on the amount of the specie in the hands of the defendant, Sullivan.

Ex Parte McCardle.

Supreme Court of the United States, 1868.

[7 *Wallace*, 506.]

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress; but is conferred "with such exceptions, and under such regulations, as Congress may make"; and, therefore, acts of Congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for.
2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also.
3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.
4. The act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts, in cases of *habeas corpus*, does not except from
*507 the appellate jurisdiction of this * court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of *habeas corpus*.

APPEAL from the Circuit Court for the Southern District of Mississippi.

The case was this:

The Constitution of the United States ordains as follows:

"§ 1. The judicial power of the United States shall be vested *in one Supreme Court*, and in such inferior courts as the Congress may from time to time ordain and establish."

"§ 2. The judicial power shall extend to all cases in law or equity arising *under this Constitution, the laws of the United States*," &c.

And in these last cases the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations, as the Congress shall make*."

With these constitutional provisions in existence, Congress, on the 5th February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and *from the judgment of the said Circuit Court to the Supreme Court of the United States*.

This statute being in force, one McCardle, alleging unlawful restraint by

military force, preferred a petition in the court below, for the writ of *habeas corpus*.

*508 * The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody; but, upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal-bond, for costs, he was admitted to bail upon recognizance, with sureties, conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied.[1]

Subsequently, on the 2d, 3d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress,[2] returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

"*And be it further enacted*, That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed."

*509 * The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act. . . .

*512 * The CHIEF JUSTICE [CHASE] delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress.

*513 It is, strictly speaking, conferred * by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first

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[1] See Ex parte McCardle, 6 Wallace, 318.

[2] Act of March 27, 1868, 15 Stat. at Large, 44.

Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau* v. *The United States*,[1] particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however,
*514 is not an inference from the affirmation of other * appellate jurisdiction.

It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.[2]

On the other hand, the general rule, supported by the best elementary writers,[3] is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris* v.

[1] 6 Cranch, 312; Wiscart *v.* Dauchy, 3 Dallas, 321.

[2] Lanier *v.* Gallatas, 13 Louisiana Annual, 175: De Chastellux *v.* Fairchild, 15 Pennsylvania State, 18; The State *v.* Fleming, 7 Humphreys, 152; Lewis *v.* Webb, 3 Greenleaf, 326.

[3] Dwarris on Statutes, 538.

Crocker,[1] and more recently in *Insurance Company* v. *Ritchie*.[2] In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

*515 * It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Court under the act of 1867. It does not affect the jurisdiction which was previously exercised.[3]

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

Claflin v. Houseman, Assignee.

Supreme Court of the United States, 1876.

[93 *United States*, 130]

1. Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), the assignee might sue in the State courts to recover the assets of the bankrupt, no exclusive jurisdiction having been given to the courts of the United States. *Quære*, whether such exclusive jurisdiction is given by the Revised Statutes.
2. The statutes of the United States are as much the law of the land in any State as are those of the State; and although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet where it is not given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to.
3. In such cases, the State Courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction, derived from their constitution under the State law.

ERROR to the Supreme Court of the State of New York.

This action was brought in May, 1872, in the New York Supreme *131 Court, county of Kings, by Julius Houseman, as * assignee in bankruptcy of Comstock and Young, against Horace B. Claflin, under the thirty-fifth section of the Bankrupt Act, to recover the sum of $1,935.57, with interest, being the amount collected by Claflin on a judgment against the bankrupts, recovered within four months before the commencement of proceedings in bankruptcy. The ground of the action, as stated in the complaint, was that they (the bankrupts) suffered the judgment to be taken by default, with intent to give Claflin a preference over their other creditors, at a time when they were insolvent, and when he knew, or had reasonable cause to believe, that they were insolvent, and that the judgment was obtained in fraud of the bankrupt law. The defendant de-

[1] 13 Howard, 429. [2] 5 Wallace, 541. [3] Ex parte McCardle, 6 Wallace, 324.

murred to the complaint, assigning as cause, first, that the court had no jurisdiction of the subject of the action; secondly, that the complaint did not state facts sufficient to constitute a cause of action. Judgment was rendered for the plaintiff on the thirteenth day of January, 1873, and was subsequently affirmed both by the general term of the Supreme Court and by the Court of Appeals. This judgment is brought here by writ of error, under the second section of the act of Feb. 5, 1867 (14 Stat. 385). . . .

*133 * Mr. Justice Bradley delivered the opinion of the court.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the State courts. . . .

*135 * The assignee, by the fourteenth section of the Bankrupt Act (Rev. Stat. sect. 5046), becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity. Of these actions and suits the State courts have cognizance. Why should not an assignee have power to bring them in those courts, as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the State courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held, in *The Bank* v. *Deveaux,* 5 Cranch, 61, that this did not authorize the bank to sue in the courts of the United States, without showing proper citizenship of the parties in different States. The bank was obliged to sue in the State courts. And yet here was a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy. The second bank of the United States had express capacity "to sue and be sued in all State courts having competent jurisdiction, and in any Circuit Court of the United States." In the case of *Osborn* v. *The Bank,* 9 Wheat. 738, 815, it was objected that Congress had not authority to enable the bank to sue in the Federal courts merely because of its being created by an act of Congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State courts.

Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the State courts. *Ex parte Christie,* 3 How. 318, 319; *Nugent* v. *Boyd,* id. 426; *Wood* v. *Jenkins,* 10 Met. 583.

Other analogous cases have occurred, and the same result has

*136 * been reached; the general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the State courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the Constitution, fairly considered, forbids it.

The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises,—sometimes with a leaning in one direction and sometimes in the other,—but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the Federal and State governments, there is really no just foundation for excluding the State courts from all such jurisdiction.

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, ac-
*137 quired * under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor,* 4 Wall. 429, and Story, J., in *Martin* v. *Hunter's Lessee,* 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte McNeil,* 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the

proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman* v. *Booth,* 21 How. 506; and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.

*138 * A reference to some of the discussions, to which the subject under consideration has given rise, may not be out of place on this occasion.

It was fully examined in the eighty-second number of "The Federalist," by Alexander Hamilton, with his usual analytical power and far-seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate. After showing that exclusive delegation of authority to the Federal government can arise only in one of three ways,—either by express grant of exclusive authority over a particular subject; or by a simple grant of authority, with a subsequent prohibition thereof to the States; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the States,—he says, that these principles may also apply to the judiciary as well as the legislative power. Hence, he infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes. But, as their previous jurisdiction could not by possibility extend to cases which might grow out of and be peculiar to the new constitution, he considered that, as to such cases, Congress might give the Federal courts sole jurisdiction. "I hold," says he, "that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When, in addition to this, we consider the State governments and the national government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

*139 * These views seem to have been shared by the first Congress in drawing up the Judiciary Act of Sept. 24, 1789; for, in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the State courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases.

Thus, by the Judiciary Act, exclusive cognizance was given to the circuit and district courts of the United States of all crimes and offences cognizable under the authority of the United States; and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction, of all seizures on water

under the laws of impost, navigation, or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. Concurrent jurisdiction with the State courts was given to the district and circuit courts of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States, and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is between a citizen of the State where the suit is brought and a citizen of another State, where an alien is a party, &c. Here, no distinction is made between those branches of jurisdiction in respect to which the Constitution uses the expression "*all cases,*" and those in respect to which the term "all" is omitted. Some have supposed that wherever the Constitution declares that the judicial power shall extend to "all cases,"—as, all cases in law and equity arising under the Constitution, laws, and treaties of the United States; all cases affecting ambassadors, &c.,—the jurisdiction of the Federal courts is necessarily exclusive; but that where the power is simply extended "to controversies" of a certain class,—as, "controversies to which the United States is a party," &c.,—the jurisdiction of the Federal courts is not necessarily exclusive. But no such distinction seems to have been recognized by Congress, as already seen in the Judiciary Act; and subsequent acts show the same thing. Thus, the first patent law for se-
*140 curing to inventors * their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the Circuit Court of the United States, "or any other court having competent jurisdiction,"—meaning, of course, the State courts. The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the circuit courts as to imply that it was exclusive of the State courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870, and Rev. Stat. U. S., sect. 711; *Parsons* v. *Barnard,* 7 Johns. 144; *Dudley* v. *Mayhew,* 3 Comst. 14; *Elmer* v. *Pennel,* 40 Me. 434.

So with regard to naturalization,—a subject necessarily within the exclusive regulation of Congress,—the first act on the subject, passed in 1790, and all the subsequent acts, give plenary jurisdiction to the State courts. The language of the act of 1790 is, "any common-law court of record in any one of the States," &c. 1 Stat. 103. The act of 1802 designates "the Supreme, Superior, District, or Circuit Court of some one of the States, or of the territorial districts of the United States, or a circuit or district court of the United States." 2 Stat. 153.

So, by acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties, and forfeitures under the revenue laws of the United States. 2 Stat. 354, 489. And by act of March 3, 1815, cognizance was given to State and county courts, generally, of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat. 244.

These instances show the prevalent opinion which existed, that the State courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the State courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general

argument. See *United States* v. *Lathrop,* 17 Johns. 4. See, especially, the able dissenting opinion of Mr. Justice Platt, id. 11.

It was, indeed, intimated by Mr. Justice Story, *obiter dictum,* in de-
*141 livering the opinion of the court in *Martin* v. *Hunter's Lessee,* * 1 Wheat. 334–337, that the State courts could not take *direct* cognizance of cases arising under the Constitution, laws, and treaties of the United States, as no such jurisdiction existed before the Constitution was adopted. This is true as to jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent) under the authority of the States. Inventors had grants of exclusive right to their inventions before the Constitution was adopted, and the State courts had jurisdiction thereof. The change of authority creating the right did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. *Houston* v. *Moore,* decided in 1820, 5 Wheat. 1, was such a case. Congress, in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine, to be determined and adjudged by *a court-martial,* without specifying what court-martial. The legislature of Pennsylvania also passed a militia law, providing for the organization, training, and calling out the militia, and establishing courts-martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and, as far as it covered the same ground, was for that reason held to be inoperative and void. Houston, a delinquent under the United States law, was tried by a State court-martial; and it was decided that the court had jurisdiction of the offence, having been constituted, in fact, to enforce the laws of the United States which the State legislature had re-enacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the State court had jurisdiction of the offence, irrespective of the authority, State or Federal, which created it. Not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts. Justices Story and Johnson dissented; and, perhaps, the court went further, in that case, than it would now. The act of Congress
*142 having * instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction; and the court conceded that Congress had the power to make the jurisdiction of its own courts exclusive.

In *Cohens* v. *Virginia,* 6 Wheat. 415, Chief Justice Marshall demonstrates the necessity of an appellate power in the Federal judiciary to revise the decisions of State courts in cases arising under the Constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says, "The propriety of intrusting the construction of the Constitution and laws, made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn in question. It seems to be a corollary from this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the

judgment rendered in them by the State tribunals. If the Federal and State courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States, and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted."

See the subject further discussed in 1 Kent's Com. 395, &c., Sergeant on the Const. 268; 2 Story on the Const., sect. 1748, &c.; 1 Curtis's Com., sects. 119, 134, &c.

The case of *Teal* v. *Felton* was a suit brought in the State court of New York against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the Supreme Court and Court of Appeals of New York, and their decision was affirmed by this court. 1 Comst. 537; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

*143 Without discussing the subject further, it is sufficient to say, * that we hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the State courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case. *Judgment affirmed.*

III

THE NATURE OF A CASE, CONTROVERSY, OR SUIT.

The act of *Congress* more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it can not be presumed, that the general word "controversies" was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same Government only, are uniformly considered of a local nature, and to be decided by its particular laws. (*Mr. Justice Iredell in Chisholm* v. *Georgia, 2 Dallas, 419, 431–432, decided in 1793.*)

A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. (*Chief Justice Marshall in Cohens* v. *Virginia, 6 Wheaton, 264, 379, decided in 1821.*)

The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question can not be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. (*Chief Justice Marshall in Cohens* v. *Virginia, 6 Wheaton, 264, 405, decided in 1821.*)

That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States. (*Chief Justice Marshall in Osborn* v. *Bank of the United States, 9 Wheaton, 738, 819, decided in 1824.*)

What then is to be done if these limitations of power are transgressed by any State, or by the United States? The duty of annulling such usurpations is confided by the Third Article of the Constitution to the Supreme Court, and to such inferior Courts as Congress may from time to time ordain and establish. But this remarkable power is capable only of indirect exercise; it is called into activity by "cases," by actual controversies, to which individuals, or States, or the United States, are parties. The point of unconstitutionality is raised by the arguments in such controversies; and the decision of the Court follows the view which it takes of the Constitution. A declaration of unconstitutionality, not provoked by a definite dispute, is unknown to the Supreme Court. (*Sir Henry Sumner Maine, Popular Government, 1886, pp. 217–218.*)

State of Wisconsin v. Pelican Insurance Company.

Supreme Court of the United States, 1888.

[127 *United States*, 265.]

This court has not original jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another State for a pecuniary penalty for a violation of its municipal law.

THIS was an action of debt, commenced in this court by the State of Wisconsin against a corporation of Louisiana. The declaration was as follows:

"The plaintiff, The State of Wisconsin, and one of the States of the United States, now comes and complains of the defendant, The Pelican Insurance Company of New Orleans, a corporation duly organized and existing under the laws of the State of Louisiana, in a plea of debt—

"For that, whereas the plaintiff, the said State of Wisconsin on the 16th day of September in the year 1886, at the county of Dane in the said State of Wisconsin, and in and before the Dane County Circuit Court, in said State—such court being then and there a court of general jurisdiction under the laws of said State—and by the consideration and judgment of the said court, re-
*266 covered against the said defendant, * the said Pelican Insurance Company, a judgment in favor of the said plaintiff for the sum of eight thousand five hundred dollars damages, together with the further sum of forty-five dollars and thirty-nine cents for costs and disbursements, amounting in all to the sum of eight thousand five hundred and forty-five dollars and thirty-nine cents; which said judgment still remains in that court in full force and effect, and not in anywise modified, reversed, set aside, appealed from, or otherwise vacated; and the said plaintiff, the said State of Wisconsin, hath not obtained any satisfaction upon the said judgment, but, on the contrary, the whole thereof, together with interest thereon from said date of such judgment, remains wholly unpaid and owing; whereby an action hath accrued unto the said plaintiff the said State of Wisconsin, to demand and have from and of the said defendant the said sum of eight thousand five hundred and forty-five dollars and thirty-nine cents, with interest.

"Wherefore the said plaintiff, the said State of Wisconsin, saith that the plaintiff is injured and hath sustained damage to the said amount of eight thousand five hundred and forty-five dollars and thirty-nine cents, with interest, and therefore it brings this suit."

Annexed to the declaration was a copy of the record of the judgment therein described, which showed that it was rendered on default of the defendant, after service of summons on three persons, each of whom was stated in the officer's return to be a resident and citizen of Wisconsin and an agent of the defendant, upon a complaint alleging that the defendant had done business in the State for thirty months, without having itself, or by any officer, agent or other person in its behalf, prepared or deposited in the office of the commissioner of insurance of the State annual statements of its business, as required by the provision of § 1920 of the Revised Statutes of Wisconsin, and that the defendant had thereby become indebted to the plaintiff in the sum of $15,000, according to that provision. . . .

*267 * In the present action in this court, the defendant filed several pleas, the first of which was as follows:

"The defendant is a civil corporation organized under the terms of the Revised Statutes of the State of Louisiana, sections 638 to 688, both inclusive, and is *268 authorized to effect fire * insurances, and is subject to suit and required to determine its domicil in the city aforesaid, and to maintain and designate an officer of that company to receive there citations and other judicial writs and notices. This duty has been fulfilled from the date of the organization, and the charter of the company has been recorded and published, as those statutes require, in the office of the recorder of mortgages and a city paper, for the time defined in the statute. No other designation has been made or required of the defendant. The section 687 of the Revised Statutes of the United States defines the original jurisdiction of this court, and designates as subjects for the exercise of that jurisdiction, where a State is the complainant, citizens of States other than of the plaintiff or complainant; and, that there should be no error on the subject, the first section of the Fourteenth Amendment to the Constitution of the United States exactly describes all of those who are citizens. They are natural persons born or naturalized within the limits of the United States, and having a residence in any State determines the State in which he may have privilege or immunity as a citizen. Moreover, the complaint of the plaintiff discloses that this defendant is a fire insurance company, without political character or interstate relations, and had its origin and domicil in New Orleans, and that the said corporation had offended the State of Wisconsin by imputed and alleged disobedience or inattention to her statute laws, and had incurred heavy forfeitures and penalties by such offences to the sum stated in the demand, and for the collection of which fines and forfeitures this suit has been commenced in this court. But the defendant says that the statute of the United States, above cited, further defines the cause for the exercise of original jurisdiction that the controversy should be of a civil nature. It excludes from cognizance of this court the punitive statutes and divers litigations arising out of the internal and peculiar or peevish regulations, accompanied with fines, forfeitures, and arbitrary exactions, which a State may impose upon citizens or corporations of other States from a just cause, or from caprice or captiousness. The controversy must be of a civil nature, and not of *269 * the punitive nature, as shown by this record. Wherefore, this defendant submits to this court that the complaint of this plaintiff does not show a cause within the original jurisdiction of the court, nor within the terms of the statutes of the United States."

To this plea the plaintiff filed a general demurrer, upon which the case was set down for argument. . . .

*286 * Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for *287 not making returns to * the insurance commissioner of the State, as re-

quired by that statute. The leading question argued at the bar is whether such an action is within the original jurisdiction of this court.

The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of those States.

The Constitution of the United States, as originally established, ordains in art. 3, sect. 2, that the judicial power of the United States shall extend "to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects;" and that in all cases "in which a State shall be party" this court shall have original jurisdiction. The Eleventh Article of Amendment simply declares that "the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States; and it is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the federal courts. *Kansas Pacific Railroad* v. *Atchison &c. Railroad,* 112 U. S 414; *Paul* v. *Virginia,* 8 Wall. 168, 178; *Pennsylvania* v. *Wheeling Bridge,* 13 How. 518.

Yet, notwithstanding the comprehensive words of the constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens; and a consideration of the cases in which it has heretofore had occasion to pass upon the construction and effect of these provisions of the Constitution may throw light on the determination of the question before us.

*288 *As to "controversies between two or more States." The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress. Story on the Constitution, § 1681; *New Jersey* v. *New York,* 3 Pet. 461; 5 Pet. 284; 6 Pet. 323; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 724, 736, 759; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591, 628; *Missouri* v. *Iowa,* 7 How. 660, and 10 How. 1; *Florida* v. *Georgia,* 17 How. 478; *Alabama* v. *Georgia,* 23 How. 505; *Virginia* v. *West Virginia,* 11 Wall. 39; *Missouri* v. *Kentucky,* 11 Wall. 395. See also *Georgia* v. *Stanton,* 6 Wall. 50, 72, 73.

The books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two States.

In *Fowler* v. *Lindsey* and *Fowler* v. *Miller,* actions of ejectment were pending in the Circuit Court of the United States for the District of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certioari* to remove those actions into this court as belonging exclusively to its jurisdiction was refused, because a State

was neither nominally nor substantially a party to them. 3 Dall. 411. Upon a bill in equity afterwards filed in this court by the State of New York against the State of Connecticut to stay the actions of ejectment, this court refused the injunction prayed for, because the State of New York was not a party to them, and had no such interest in their decision as would support the bill. *New York* v. *Connecticut,* 4 Dall. 1, 3.

This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in *Kentucky* v. *Dennison,* 24 How. 66, where
*289 the State of Kentucky, by her governor, applied * to this court in the exercise of its original jurisdiction for a writ of mandamus to the governor of Ohio to compel him to surrender a fugitive from justice, this court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. And in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana,* 108 U. S. 76, it was adjudged that a State, to whom, pursuant to her statutes, some of her citizens, holding bonds of another State, had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other State in this court. See also *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 20, 28, 51, 75.

In *South Carolina* v. *Georgia,* 93 U. S. 4, this court, speaking by Mr. Justice Strong, left the question open, whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;" and dismissed the bill, because no unlawful obstruction of navigation was proved. 93 U. S. 14.

As to "controversies between a State and citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in *Chisholm* v. *Georgia,* 2 Dall. 419, 475; Story on the Constitution, §§ 1638, 1682. The grant is of "judicial power," and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

By the law of England and of the United States, the penal laws of a
*290 country do not reach beyond its own territory, * except when extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheaton's International Law (8th ed.) §§ 113, 121.

Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim, "The courts of no country execute the penal laws of another." *The Antelope,* 10 Wheat. 66, 123.

The only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature. *The Sapphire,* 11 Wall. 164; *King of Spain* v. *Oliver,* 2 Wash. C. C. 429, and Pet. C. C. 217, 276. The case of *The Sapphire* was a libel in admiralty, filed by the late Emperor of the French, and prosecuted by the French Republic after his deposition, to recover damages for a collision between an American ship and a French transport; and Mr. Justice Bradley, delivering the judgment of this court sustaining the suit, said: "A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts." 11 Wall. 167. The case of *The King of Spain* v. *Oliver,* although a suit to recover duties imposed by the revenue laws of Spain, was not founded upon those laws, or brought against a person who had broken them, but was in the nature of an action of assumpsit against other persons alleged to be bound by their own contract to pay the duties; and the action failed because no express or implied contract of the defendants was proved. Pet. C. C. 286, 290.

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton's Conflict of Laws, § 833;
*291 * Westlake's International Law (1st ed.), § 388; Piggott on Foreign Judgments, 209, 210.

Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in his Commentaries on the Conflict of Laws, after having said, "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself;" and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages; adds, "But this includes not a decree decerning for a penalty; because no court reckons itself bound to punish, or to concur in punishing any delict committed *extra territorium.*" 2 Kansas on Equity (3d ed.) 326, 366; Story's Conflict of Laws, §§ 600, 622.

It is true that if the prosecution in the courts of one country for a violation of its municipal law is *in rem,* to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the State, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue. *Rose* v. *Himely,* 4 Cranch, 241; *Hudson* v. *Guestier,* 4 Cranch, 293; *Bradstreet* v. *Neptune Ins. Co.,* 3 Summer, 600, 605; Piggott on Foreign Judgments, 264. But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right.

The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they

have by law or usage in the State in which they were rendered. Constitution, art. 4, sect. 1; Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.

*292 Those provisions establish a rule of evidence, rather than of * jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being reëxaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Hanley* v. *Donoghue,* 116 U. S. 1, 4.

In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, "The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Story's Conflict of Laws, § 609; *Thompson* v. *Whitman,* 18 Wall. 457, 462, 463.

A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, "does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." *McElmoyle* v. *Cohen,* 13 Pet. 312, 325.

*293 The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the * technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. *Louisiana* v. *New Orleans,* 109 U. S. 285, 288, 291; *Louisiana* v. *St. Martin's Parish,* 111 U. S. 716; *Chase* v. *Curtis,* 113 U. S. 452, 464; *Boynton* v. *Ball,* 121 U. S. 457, 466.

*294 From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign * country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. This is shown both by the nature of the cases in which relief has been granted or sought, and by acts of Congress and opinions of this court more directly bearing upon the question.

The earliest controversy in this court, so far as appears by the reports of its decisions, in which a State was the plaintiff, is that of *Georgia* v. *Brailsford*.

At February term, 1792, the State of Georgia filed in this court a bill in equity against Brailsford, Powell and Hopton, British merchants and copartners, alleging that on August 4, 1782, during the Revolutionary War, the State of Georgia enacted a law, confiscating to the State all the property within it (including debts due to British merchants or others residing in Great Britain) of persons who had been declared guilty or convicted, in one or other of the United States, of offences which induced a like confiscation of their property within the States of which they were citizens; and also sequestering, and directing to be collected for the benefit of the State, all debts due to merchants or others residing in Great Britain, and confiscating to the State all the property belonging and debts due to subjects of Great Britain; and that by the operation of this law all the debts due from citizens of Georgia to persons who had been subjected to the penalties of confiscation in other States, and of British merchants and others residing in Great Britain, and of all other British subjects, were vested in the State of Georgia. The bill further alleged that one Spalding, a citizen of Georgia, was indebted to the defendants upon a bond, which by virtue of this law was transferred from the obligees and vested in the State; that Brailsford was a citizen of Great Britain, and resided there from 1767 till after the passing of the law, and that Hopton's and Powell's property (debts excepted) had been confiscated by acts of the legislature of South Carolina; that Brailsford, Hopton and Powell had brought an action and recovered judgment against Spalding upon this bond, and had taken out execution against him, in the Circuit Court of the United
*295 States for the District of Georgia, and that the parties to that * action had confederated together to defraud the State. Upon the filing of the bill, this court, without expressing any opinion upon the merits of the case, granted a temporary injunction to stay the money in the hands of the marshal of the Circuit Court, until the title to the bond as between the State of Georgia and the defendants could be tried. 2 Dall. 402.

At February term, 1793, upon a motion to dissolve that injunction, this court held that if the State of Georgia had the title in the debt (upon which no opinion was then expressed) she had an adequate remedy at law, by action upon the bond; but, in order that the money might be kept for the party to whom it belonged, ordered the injunction to be continued till the next term, and, if Georgia should not then have instituted her action at common law, to be dissolved. 2 Dall. 415.

Such an action was brought accordingly, and was tried by a jury at the bar of this court at February term, 1794, when the court was of opinion, and so charged the jury, that the act of the State of Georgia did not vest the title in the debt in the State at the time of passing it, and that by the terms of the act the debt was not confiscated, but only sequestered, and the right of the obligees to recover it revived on the treaty of peace; and the jury returned a verdict for the defendants. 3 Dall. 1.

It thus appears that in *Georgia* v. *Brailsford* the State did not sue for a penalty, or upon a judgment for a penalty, imposed by a municipal law, but to assert a title, claimed to have absolutely vested in her, not under an ordinary act of municipal legislation, but by an act of war, done by the State of Georgia as

one of the United States (the Congress of which had not then been vested with the power of legislating to that effect) to assist them against their common enemy by confiscating the property of his subjects; and that the only point decided by this court, except as to matters of procedure, was that the title had not vested in the State of Georgia by the act in question.

In *Pennsylvania* v. *Wheeling Bridge,* 13 How. 518, this court, upon a bill in equity by the State of Pennsylvania against a corporation of Virginia,
*296 ordered the taking down or * heightening of a bridge built by the defendant over the Ohio River, under a statute of Virginia, which the court held to have obstructed the navigation of the river, in violation of a compact of the State, confirmed by act of Congress. 13 How. 561. See also *Willamette Bridge* v. *Hatch,* 125 U. S. 1, 15, 16. All the judges who took part in the decision in the *Wheeling Bridge Case* treated the suit as brought to protect the property of the State of Pennsylvania. Mr. Justice, McLean, delivering the opinion of the majority of the court, said: "In the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it." 13 How. 560, 561. So Chief Justice Taney, who dissented from the judgment, said: "She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned." 13 How. 589. And Mr. Justice Daniel, the other dissenting judge, took the same view. 13 How. 596.

Mississippi v. *Johnson,* 4 Wall. 475, and *Georgia* v. *Stanton,* 6 Wall. 50, were cases of unsuccessful attempts by a State, by a bill in equity against the President or the Secretary of War, described as a citizen of another State, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of Congress alleged to unconstitutionally affect the political rights of the State.

Texas v. *White,* 7 Wall. 700, *Florida* v. *Anderson,* 91 U. S. 667, and *Alabama* v. *Burr,* 115 U. S. 413, were suits to protect rights of property of the State. In *Texas* v. *White,* the bill was maintained to assert the title of the State of Texas to bonds belonging to her, and held by the defendants, citizens of other States, under an unlawful negotiation and transfer of the bonds. In *Florida* v. *Anderson,* the suit concerned the title to a railroad, and was maintained because the State of Florida was the holder of bonds secured by a statutory lien upon the road, and had an interest in an internal improvement fund pledged to secure the payment of those bonds. In *Alabama* v. *Burr,* the object of the suit was to
*297 indemnify the * State of Alabama against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendants; and upon the facts of the case the bill was not maintained.

In *Pennsylvania* v. *Quicksilver Co.,* 10 Wall. 533, an action brought in this court by the State of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another State.

In *Wisconsin* v. *Duluth,* 96 U. S. 379, the bill sought to restrain the improvement of a harbor on Lake Superior, according to a system adopted and put in execution under authority of Congress, and was for that reason dismissed, without considering the general question whether a State in order to maintain a suit

in this court, must have some proprietary interest that has been affected by the defendant.

The cases heretofore decided by this court in the exercise of its original jurisdiction have been referred to, not as fixing the outermost limit of that jurisdiction, but as showing that the jurisdiction has never been exercised, or even invoked, in any case resembling the case at bar.

The position that the jurisdiction conferred by the Constitution upon this court, in cases to which a State is a party, is limited to controversies of a civil nature, does not depend upon mere inference from the want of any precedent to the contrary, but has express legislative and judicial sanction

By the Judiciary Act of September 24, 1789, c. 20, § 13, it was enacted that "the Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction." 1 Stat. 80. That act, which has continued in force ever since, and is embodied in § 687 of the Revised Statutes, was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning. *Ames* v. *Kansas,* 111 U. S. 449, 463, 464.

*298 * In *Chisholm* v. *Georgia,* 2 Dall. 419, decided at August term, 1793, in which the judges delivered their opinions *seriatim,* Mr. Justice Iredell, who spoke first, after citing the provisions of the original Constitution, and of § 13 of the Judiciary Act of 1789, said: "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but, in respect to the subject matter upon which such jurisdiction is to be exercised, uses the word 'controversies' only. The act of Congress more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think was well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws." 2 Dall. 431, 432. None of the other judges suggested any doubt upon this point; and Chief Justice Jay, in summing up the various classes of cases to which the judicial power of the United States extends, used "demands" (a word quite inappropriate to designate criminal or penal proceedings) as including everything that a State could prosecute against citizens of another State in a national court. 2 Dall. 475.

In *Cohens* v. *Virginia,* 6 Wheat. 264, decided at October term, 1821, Chief Justice Marshall, after showing that the Constitution had given jurisdiction to the courts of the Union in two classes of cases, in one of which, comprehending cases arising under the Constitution, laws and treaties of the United States, the jurisdiction depended on the character of the cause, and in the other, comprehending controversies between two or more States, or between a State and citizens of another State, the jurisdiction depended entirely on the character of the parties, said: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the

*299 character of the party, and an original suit might be instituted * in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction." 6 Wheat. 398, 399.

The soundness of the definition, given in the Judiciary Act of 1789, of the cases coming within the original jurisdiction of this court by reason of a State being a party, as "controversies of a civil nature," was again recognized by this court in *Rhode Island* v. *Massachusetts,* decided at January term, 1838. 12 Pet. 657, 722, 731.

The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Wisconsin Rev. Stat. § 1920. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Wisconsin Stat. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias,* or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceedings tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence.

*300 * This court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine.

The original jurisdiction of this court is conferred by the Constitution, with out limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offence, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution.

Judgment for the defendant on the demurrer.

La Abra Silver Mining Company v. United States.

Supreme Court of the United States, 1899.

[175 *United States*, 423.]

The suit brought by the Attorney General in the Court of Claims, in behalf of the United States pursuant to the Act of December 28, 1892, involved rights capable of judicial determination and was a "case" within the meaning of the clause of the Constitution extending the judicial power of the United States to all cases in law and equity arising under that instrument, the laws of the United States and the treaties made by it or under its authority. The act did not in any wise trench upon the constitutional functions of the President. Nor was it simply ancillary or advisory to him. Whatever decree was rendered by the Court of Claims was, unless reversed, binding and conclusive upon the United States and the defendants;

The act was not liable to the objection that it was inconsistent with the principles underlying international arbitration. On the contrary, such legislation is an assurance in the most solemn and binding form that the Government of this country will exert all the power it possesses to enforce good faith upon the part of citizens who, asserting that they have been wronged by the authorities of another country, seek the intervention of their Government to obtain redress. . . .

The question stated in the act of 1892—whether the award in question "was obtained as to the whole sum included therein, or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Silver Mining Company, or its agents, attorneys or assigns"—is answered in the affirmative as to the whole sum included in the award.

The Commissioners appointed under the treaty between the United States and Mexico concluded July 4, 1868, and proclaimed February 1, 1869, (15 Stat. 679), having differed in opinion as to the allowance of the claim of the La Abra Silver Mining Company, a New York corporation, against Mexico, the Umpire decided for that company and allowed its claim, amounting, principal and interest, to the sum of $683,041.32. Mexico met some of the instalments of the award and then laid before the United States certain newly discovered evidence which, it contended, showed that the entire claim of the La Abra Company was fictitious and fraudulent. The Secretary of State thereafter withheld the remaining instalments paid by Mexico, and upon examining the new evidence reported to the President that in his judgment the honor of the United States was concerned to inquire whether in submitting the La Abra claim to the Commission its confidence had not been seriously abused, and recommended that Congress exert its plenary
*424 authority in respect * of the disposition of the balance of the funds received from Mexico and remaining in the hands of the United States. Finally, Congress passed the act of December 28, 1892, (27 Stat. 409, c. 14,) by which the Attorney General was directed to bring suit in the name of the United States in the Court of Claims against the La Abra Company and all persons asserting any interest in the award of the Commission to determine whether that award was obtained, as to the whole sum included therein or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the company, or its agents, attorneys or assigns, and if so determined, to bar and foreclose all claim in law or equity on the part of the company, its legal representatives or assigns to the money or any such part thereof received from the Republic of Mexico for or on account of the award. By that act full

jurisdiction was conferred on the Court of Claims, with right of appeal to this court, to determine such suit, to make all proper interlocutory and final decrees therein, and to enforce the same by injunction or other final process. The act further authorized the return to Mexico of any moneys paid by it on the award and remaining in the custody of the United States, if the issue of fraud was determined adversely to the company. If the decision was favorable to the company, it was made the duty of the Secretary of State to proceed with the distribution of the funds in his hands. The act of 1892 was presented to the President on December 20. Two days thereafter Congress took a recess until January 4, 1893. The President signed the bill on December 28, 1892.[1]

*450 * Mr. Justice Harlan delivered the opinion of the court. . . .

*455 * II. It is said that the present proceeding based on the act of 1892 is not a "case" within the meaning of that clause of the Constitution declaring that the judicial power of the United States shall extend to all cases in law and equity arising under that instrument, the laws of the United States, or treaties made or which shall be made under their authority. Art. III, § 2. This Article, as has been adjudged, does not extend the judicial power to every violation of the Constitution that may possibly take place, but only "to a case in law or equity, in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the Article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution to which the judicial power of the United States would extend." *Cohens* v. *Virginia,* 6 Wheat. 264, 405. In the same case, Chief Justice Marshall declared a suit to be the prosecution by a party of some claim, demand or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he was deprived.

*456 * Referring to the provision defining the judicial power of the United States, the court in a subsequent case said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall receive such a form that the judicial power is capable of acting on it. That power is capable of acting only when a subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." *Osborn* v. *United States Bank,* 9 Wheat. 738, 819. In *Murray* v. *Hoboken,* 18 How. 272, 284, this court said that Congress can neither "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." But in the same case it was observed by Mr. Justice Curtis, speaking for the court, that "there are matters involving public rights which may be presented in such form

[1] The statement of the case is taken from the headnote, and only those portions of the opinion dealing with the nature of a "case" and judicial power are printed.—Editor.

that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Of like import was the judgment in *Smith* v. *Adams,* 130 U. S. 167, 173, in which the court said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs."

The principles announced in the above cases are illustrated by the opinion prepared by Chief Justice Taney for the case of *Gordon* v. *United States,* 2 Wall. 561, and printed in 117 U. S. 697. That case was brought to this court from the Court of Claims, and related to a demand asserted against the United States. The principal question was whether this court had jurisdiction to
*457 review the final order made in the court * below. The Chief Justice died before the case was decided and the opinion prepared by him in recess was not formally accepted. But if the court approved his views, as it undoubtedly did, the appeal was dismissed upon the ground that Congress could not authorize or require this court to express an opinion on a case in which its judicial power could not be exercised, and when its judgment would not be final and conclusive upon the rights of the parties. "The award of execution," Chief Justice Taney said, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award, the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." In a more recent case this court dismissed an appeal from a final order made in the Court of Claims in virtue of a particular statute, observing: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress." *In re Sanborn,* 148 U. S. 222, 226; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 483.

Under the principles established in the cases above cited, the objections urged against the jurisdiction of the Court of Claims and of this court cannot be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by
*458 * the Court of Claims and by this court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties.

The money in the hands of the Secretary of State was paid to the United States by Mexico pursuant to the award of the Commission. That tribunal dealt only with the two Governments, had no relations with claimants, and could take cognizance only of claims presented by or through the respective governments.

No claimant, individual or corporate, was entitled to present any demand or proofs directly to the Commission. No evidence could be considered except such as was furnished by or on behalf of the respective governments. While the claims of individual citizens presented by their respective governments were to be considered by the Commission in determining amounts "the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." And "each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection so far as possible against frauds and impositions by the individual claimants." *Frelinghuysen* v. *Key,* above cited. As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the Commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the Government legally withheld it from distribution.

When the La Abra Company asked the intervention of the United States it did so on the condition imposed by the principles of comity recognized by all civilized nations, that it would act in entire good faith, and not put the government whose aid it sought in the attitude of asserting against the Mexican Republic a fraudulent or fictitious claim; consequently the United States, under its duty to that Republic was required to withhold any sum awarded and paid on account of the Company's claim if it appeared that such claim was of that
*459 character. As between the United States and the * Company, the honesty or genuineness of the latter's claim was open to inquiry in some appropriate mode for the purpose of fair dealing with the government against which such claim was made through the United States. We so adjudged in the *Key case.* The United States assumed the responsibility of presenting the La Abra claim and made it its own in seeking redress from the Mexican Republic. But from such action on its part no contract obligations arose with the La Abra Company "to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the Commission." *Boynton* v. *Blaine,* above cited.

These considerations make it clear that the act of 1892 is not liable to the objection that it subjected to judicial determination a matter committed by the Constitution to the exclusive control of the President. The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment. The question for the determination of which the present suit was directed to be instituted was whether the award made by the Commission in respect to the claim of the La Abra Company was obtained as to the whole sum included therein or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the Company, or its agents, attorneys or assigns. It cannot, we think, be seriously disputed that the question whether fraud has or has not been committed in presenting or prosecuting a demand or claim before a tribunal having authority to allow or disallow it is peculiarly judicial in its nature, and that in ascertaining the facts material in such an inquiry no means are so effectual as those employed by or in a court of justice. The Executive branch of the Government recognized the inadequacy for such an investigation of any means it possessed, and declared that Congress by its "plenary authority" ought not only

to decide whether such an investigation should be made, but provide an adequate procedure for its conduct and prescribe the consequences to follow therefrom.

*460 The suggestion that the question of fraud be committed to the determination of a judicial * tribunal first came from the Executive branch of the Government. Undoubtedly Congress, having in view the honor of the Government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute, approved by the President, or which being disapproved by him was passed by the requisite consitutional vote, have directed the return to Mexico, the other party to the award, of such moneys as had been paid into the hands of the Secretary of State. It is also clear that in the absence of any statute suspending the distribution of such moneys, the President could have ignored the charges of fraud and ordered the distribution to proceed according to the terms of the treaty and the award. But it does not follow that Congress was without power, no distribution having been made, to control the whole matter by plenary legislation.

It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate. *Head Money cases,* 112 U. S. 580, 599; *Whitney* v. *Robertson,* 124 U. S. 190, 194; *Chinese Exclusion case,* 130 U. S. 581, 600; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 721. It is therefore difficult to perceive any ground upon which to question its power to make the distribution of moneys in the hands of the Secretary of State—representing in that matter the United States and not simply the President—depend upon the result of a suit by which the United States would be bound and in which the claimants to the fund in question could be heard as parties, and which was to be brought in a court of the United States by its authority, for the purpose of determining whether the La Abra Company, its agents or assigns had been guilty of fraud in the matter of the claim that it procured to be presented to the Commission. The act of 1892 is to be taken as a recognition, so far as the United States is concerned, of the legal right of the Company to receive the moneys in question unless it appeared upon judicial investigation that the

*461 * United States was entitled, by reason of fraud practised in the interest of that corporation, to withhold such moneys from it. Here then is a matter subjected to judicial investigation in respect of which the parties assert *rights*—the United States insisting upon its right under the principles of international comity to withhold moneys received by it under a treaty on account of a certain claim presented through it before the Commission organized under that treaty in the belief, superinduced by the claimant, that it was an honest demand; the claimant insisting upon its absolute legal right under the treaty and the award of the Commission, independently of any question of fraud, to receive the money and disputing the right of the United States upon any ground to withhold the sum awarded. We entertain no doubt these rights are susceptible of judicial determination within the meaning of the adjudged cases relating to the judicial power of the courts of the United States as distinguished from the powers committed to the Executive branch of the Government.

It remains, in our consideration of the question of jurisdiction, to inquire whether the judgment authorized by the act of 1892 to be rendered would be a final, conclusive determination, as between the United States and the defendants,

of the rights claimed by them respectively, or only ancillary or advisory. In our opinion the act of Congress authorized a final judgment of the former character and therefore the judgment of the Court of Claims is reviewable by this court in the exercise of its appellate judicial power. If our judgment should be one of affirmance then the La Abra Company, and its legal representatives or assigns are barred of all claim, legal or equitable, to the money received by the United States from the Republic of Mexico on account of the award of the Commission. Such a determination would rest upon the broad ground that the United States in its efforts to protect the alleged rights of an American corporation had been the victim of fraud upon the part of that corporation, its agents or assigns, and was in law relieved from any responsibility to that corporation touching
*462 the claim in question * or the moneys received on account of it. If, on the other hand, this court should find that the charges of fraud were not sustained or were disproved, and reverse the decree of the Court of Claims, then it would become the absolute legal duty of the Secretary of State to proceed in the distribution of the moneys in his hands according to the terms of the award. It was competent for Congress by statute to impose that duty upon him and he could not refuse to obey the mandate of the law.

Much was said in argument about the interference by the act of 1892 with the discharge by the President of his constitutional functions in connection with matters involved in the relations between this country and the Republic of Mexico. For reasons already given this contention cannot be sustained. It is without support in anything done or said by the eminent jurists who have presided over the Department of State since the controversy arose as to the integrity of the claim made by the La Abra Company. On the contrary, those officers have uniformly insisted that the authority of Congress was plenary to determine whether the award in respect of those claims was procured by fraud practised on the part of that Company and whether in that event the Company should be barred of any claim to the moneys received from the Republic of Mexico. Upon this question the legislative and executive branches of the Government have acted in perfect harmony. The question arises under the Constitution of the United States and a treaty made by the United States with a foreign country, is judicial in its nature, and one to which the judicial power of the United States is expressly extended. Both branches of the Government were concerned in the enactment subjecting that question to judicial determination, and it cannot properly be said that the President by approving the act of 1892 or by recognizing its binding force surrendered any function belonging to him under the supreme law of the land.

It was also said in argument that the act of Congress in some way—not clearly defined by counsel—was inconsistent with the principles underlying
*463 international arbitration, a * mode for the settlement of disputes between sovereign States that is now more than ever before approved by civilized nations. We might well doubt the soundness of any conclusion that could be regarded as weakening or tending to weaken the force that should be attached to the finality of an award made by an international tribunal of arbitration. So far from the act of Congress having any result of that character, the effect of such legislation is to strengthen the principle that an award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the

integrity of the tribunal itself. The act of 1892 is a recognition of the principle that "international arbitration must always proceed on the highest principles of national honor and integrity." *Frelinghuysen* v. *Key,* above cited. By that act the United States declares that its citizen shall not through its agency reap the fruits of a fraudulent demand which they had induced it to assert against another country. Such legislation is an assurance in the most solemn and binding form that the Government of this country will exert all the power it possesses to enforce good faith upon the part of citizens who, alleging that they have been wronged by the authorities of another country, seek the intervention of their Government to obtain redress.

We hold that the act of 1892 is not unconstitutional upon any of the grounds adverted to; that the Court of Claims had jurisdiction to render the decree in question; that such decree, unless reversed, is binding upon the parties to this cause; and that this court, in the exercise of its appellate power, has authority to reëxamine that decree and make such order or give such direction as may be consistent with law. . . .

*499 * Our conclusion is that the question stated in the act of 1892 . . .
*500 * must be answered in the affirmative as to the whole sum included in the award. That Company placed before the Commission a state of facts that had no existence, and which we are constrained by the evidence to say its principal representatives must have known had no existence, but which being credited by the Commission under the evidence adduced before it brought about the result complained of in the bill. The whole story of losses accruing to that Company by reason of wrongs done by the authorities of Mexico, is, under the evidence, improbable and unfounded. We do not wish to be understood as saying that the Company did not meet with losses on account of its investments in this mining property. But we do adjudge that it had no claim which, upon any principle of law or equity, it was entitled to assert against the Republic of Mexico.

The decree below is *Affirmed.*

Re Metropolitan Railway Receivership.

Supreme Court of the United States, 1908.

[208 *United States,* 90.]

An unsatisfied, justiciable claim of some right involving the jurisdictional amount made by a citizen of one State against a citizen of another State is a controversy or dis-
*91 pute between the parties within the meaning of * the statutes defining the jurisdiction of the Circuit Court (acts of March 3, 1875, c. 137, § 1, 18 Stat. 470; March 3, 1887, c. 373, § 1, 24 Stat. 552; August 13, 1888, c. 866, § 1, 25 Stat. 433), and such jurisdiction does not depend upon the denial by the defendant of the existence of the claim or of its amount or validity.

In this case there being such a claim, and the requisite diversity of citizenship, the Circuit Court had jurisdiction although the defendant admitted the facts and the liability, waived

the objection that the complainants were not entitled to equitable relief, and joined in the request for appointment of receivers.

The mere fact that the defendant is engaged in interstate commerce does not give the Circuit Court jurisdiction; in cases in which this court has sustained the jurisdiction of the Circuit Court in the appointment of receivers, jurisdiction existed by reason of diversity of citizenship and not merely because the defendants were engaged in interstate commerce. . . .

Where the averments of the bill are true, and there is no question as to the diversity of citizenship, or any evidence that a case was fraudulently created to give jurisdiction to the Federal court, the case will not be regarded as collusive merely because the parties preferred to resort to the Federal court instead of to a state court; in the absence of any improper act, the motive for bringing the suit is unimportant. . . .

*106 * MR. JUSTICE PECKHAM, . . . delivered the opinion of the court.

The petitioners base their application for relief in this court upon the contention that the Circuit Court had no jurisdiction in the case brought by the Pennsylvania Steel Company, and others, against the New York City Railway Company, to appoint receivers, or to grant any relief asked for in the bill of complaint in that suit. And, as they have been denied leave to intervene therein, and they cannot appeal from the order denying such request, *Ex parte Cutting,* 94 U. S. 14; *Credits Commutation Co.* v. *United*
*107 *States,* 177 U. S. 311, they assert * they are without any remedy, unless it be granted on this application. The basis of their contention, that the Circuit Court was without jurisdiction, rests upon the assertion that there was no controversy or dispute between the parties to that suit. The counsel for the parties favoring the jurisdiction insist that these petitioners are not entitled to the remedy sought by them in this court, either by mandamus or prohibition, because the case made by them is not such as to authorize the court to issue either writ, as prayed for.

Without going into the question of the right of this court to grant the remedy sought, we prefer to place our decision upon the ground that the Circuit Court had jurisdiction, and that its action in exercising it was, therefore, valid.

The statutes defining the jurisdiction of the Circuit Court (1 Comp. Stat. 507, 508; Act March 3, 1875, c. 137, § 1, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act August 13, 1888, c. 866, § 1, 25 Stat. 433), confer it, among other cases, where "there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," ($2,000).

Although the amount involved in the suit in the Circuit Court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of the debt due each of complainants had been made and refused. This was not denied and has not been. There was therefore an unsatisfied demand made by complainants and refused by defendant at the time of the filing

of the bill. We think that where there is a justiciable claim of some right made by a citizen of one State against a citizen of another State, involving an amount
*108 equal to the amount named in the * statute, which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. *It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it.* It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso,* or whenever a judgment was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal court existed. *Hefner* v. *Northwestern Life Insurance Company,* 123 U. S. 747, 756; *Pacific Railroad* v. *Ketchum,* 101 U. S. 289, 296. In the latter case the proceeding was "by the consent of all the parties to the suit through their solicitors of record." It was stated in the opinion by Chief Justice Waite that the defendant had filed an answer under its corporate seal, in which every material allegation of the bill was confessed, and it was stated that the bonds sued for were in all respects valid obligations of the company, and the mortgage a subsisting lien. No doubt was expressed as to the jurisdiction of the court, because of the admission of the facts by the defendant and its consent to the judgment. We do not doubt the jurisdiction of the Circuit Court, although the facts were admitted, and the defendant joined with the complainants in a request that receivers should be appointed.

*109 * It is, however, argued, that although there may be jurisdiction in the case of railroads engaged in interstate commerce, yet they are exceptions, because in such a case they arise under the Constitution, although there may not have been an actual controversy between the parties. Such cases, it is said, cannot properly be regarded as precedents for claiming jurisdiction in the case of railroads wholly within the State, and doing no interstate business.

A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact. It only arises under the Constitution, or laws or treaties of the United States, when it substantially involves a controversy as to the effect or construction of the Constitution or on the determination of which the result depends. *Defiance Water Co.* v. *Defiance,* 191 U. S. 184; *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 561; *Bonin* v. *Gulf Company,* 198 U. S. 115; *Devine* v. *Los Angeles,* 202 U. S. 313. The appointment of a receiver in the case of a railroad engaged in interstate commerce does not necessarily involve any such controversy. Jurisdiction to appoint a receiver by a Circuit Court of the United States in cases of railroads engaged in interstate commerce has existed by reason of diversity of

citizenship in the various cases between the parties to the litigation, and not because the railroads were engaged in interstate commerce. The necessary diversity of citizenship is alleged to exist in the case before the Circuit Court, and there is no suspicion as to the truth of the averment. . . .

*110 * It is asserted also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed, and therefore the suit should have been dismissed by the Circuit Court under § 5 of the act of 1875, already cited. By that section it must appear to the satisfaction of the Circuit Court that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of that court, or that the parties to that suit have been improperly or collusively made or joined for the purpose of creating a case cognizable under that act, in which case the Circuit Court is directed to proceed no further therein, but to dismiss the suit on that ground. Whether the suit involved a substantial controversy we have already discussed, and the only question which is left under that act is as to collusion.

In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts,

*111 named * in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant. *Dickerman* v. *Northern Trust Co.,* 176 U. S. 181, 190; *South Dakota* v. *North Carolina,* 192 U. S. 286, 311; *Blair* v. *City of Chicago,* 201 U. S. 400, 448; *Smithers* v. *Smith,* 204 U. S. 632, 644. . . .

*112 * The rules are discharged and the petitions *Dismissed.*

Muskrat v. United States.

Brown and Gritts v. United States.

Supreme Court of the United States, 1911

[219 *United States,* 346.]

The rule laid down in *Heyburn's Case,* 2 Dall. 409, that neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a

judicial manner, applied; and *held,* that it is beyond the power of Congress to provide
*347 for a suit of this nature to be brought in the Court of * Claims with an appeal to this court to test the constitutionality of prior acts of Congress, such a suit not being a case or controversy within the meaning of the Constitution.

From its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

Under the Constitution of the United States the exercise of judicial power is limited to cases and controversies.

A case or controversy, in order that the judicial power of the United States may be exercised thereon, implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. *Chisholm* v. *Georgia,* 2 Dall. 431.

This court has no veto power on legislation enacted by Congress; and its right to declare an act of Congress unconstitutional can only be exercised when a proper case between opposing parties is submitted for determination. *Marbury* v. *Madison,* 1 Cranch, 137.

The determination by the Court of Claims, and on appeal by this court, of the constitutional validity of an act of Congress in a suit brought by authority of a subsequent act of Congress clothing such courts with jurisdiction for the avowed purpose of settling such question with provision for payment of expenses of the suit in certain contingencies out of funds in the Treasury of the United States, is not within the appellate jurisdiction conferred by the Constitution upon this court; such a suit is not a case or controversy to which the judicial power extends, nor would such a judgment conclude private parties in actual litigation.

That part of the act of March 1, 1907, c. 2285, 34 Stat. 1015, 1028, which requires of this court action in its nature not judicial within the meaning of the Constitution, exceeds the limitation of legislative authority and is unconstitutional, and the suits brought thereunder are dismissed for want of jurisdiction.

This court cannot be required to decide cases over which it has not jurisdiction because other cases are pending involving the same point of law; to do so would require it to give opinions in the nature of advice concerning legislative action.

An act of Congress, conferring jurisdiction on the Court of Claims and on this court on appeal, testing the constitutionality of prior acts of Congress will not be sustained as to the jurisdiction of the Court of Claims alone if it cannot be also sustained as to this court.

44 Court of Claims, 137, reversed with directions to dismiss the suit.

*348 The facts, which involve the constitutionality and construction * of certain acts of Congress relating to the distribution and allotment of lands and funds of the Cherokee Indians, are stated in the opinion.

Mr. Justice Day delivered the opinion of the court.

These cases arise under an act of Congress undertaking to confer jurisdiction upon the Court of Claims, and upon this court on appeal, to determine the validity of certain acts of Congress hereinafter referred to.

Case No. 330 was brought by David Muskrat and J. Henry Dick in their own behalf and in behalf of others in a like situation to determine the constitutional validity of the act of Congress of April 26, 1906, c. 1876, 34 Stat. 137, as amended by the act of June 21, 1906, c. 3504, 34 Stat. 325 *et seq.,* and to have the same declared invalid in so far as the same undertook to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled on September 1, 1902, in accordance with the act of Congress passed July 1, 1902, c. 1375, 32 Stat. 716–720–721.

*349 The * acts subsequent to that of July 1, 1902, have the effect to increase the number of persons entitled to participate in the division of the Cherokee lands and funds, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending for that purpose.

Case No. 331 was brought by Brown and Gritts on their own behalf and on behalf of other Cherokee citizens having a like interest in the property allotted under the act of July 1, 1902, c. 1368, 32 Stat. 710. Under this act, Brown and Gritts received allotments. The subsequent act of March 11, 1904, c. 505, 33 Stat. 65, empowered the Secretary of the Interior to grant rights of way for pipe lines over lands allotted to Indians under certain regulations. Another act, that of April 26, 1906, c. 1876, 34 Stat. 137, purported to extend to a period of twenty-five years the time within which full-blooded Indians of the Cherokee, Choctaw, Chickasaw, Creek and Seminole tribes were forbidden to alienate, sell, dispose of or encumber certain of their lands.

The object of the petition of Brown and Gritts was to have the subsequent legislation of 1904 and 1906 declared to be unconstitutional and void, and to have the lands allotted to them under the original act of July 1, 1902, adjudged to be theirs free from restraints upon the rights to sell and convey the same. From this statement it is apparent that the purpose of the proceedings instituted in the Court of Claims and now appealed to this court is to restrain the enforcement of such legislation subsequent to the act of July 1, 1902, upon the ground that the same is unconstitutional and void. The Court of Claims sustained the validity of the acts and dismissed the petitions. 44 C. Cls. 137, 283.

*350 These proceedings were begun under the supposed authority of an act of Congress passed March 1, 1907 (a part * of the Indian appropriation bill), c. 2285, 34 Stat. 1015, 1028. As that legislation is important in this connection so much of the act as authorized the beginning of these suits is here inserted in full:

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney General, who is hereby charged with the defense of said suits.

*351 * "Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

This act is the authority for the maintenance of these two suits.

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects."

*352 * It will serve to elucidate the nature and extent of the judicial power thus conferred by the Constitution to note certain instances in which this court has had occasion to examine and define the same. As early as 1792, an act of Congress, March 23, 1792, c. 11, 1 Stat. 243, was brought to the attention of this court, which undertook to provide for the settlement of claims of widows and orphans barred by the limitations theretofore established regulating claims to invalid pensions. The act was not construed by this court, but came under consideration before the then Chief Justice and another Justice of this court and the District Judge, and their conclusions are given in the margin of the report of *Hayburn's Case,* 2 Dall. 409. The act undertook to devolve upon the Circuit Court of the United States the duty of examining proofs, of determining what amount of the monthly pay would be equivalent to the disability ascertained, and to certify the same to the Secretary of War, who was to place the names of the applicants on the pension list of the United States in conformity thereto, unless he had cause to suspect imposition or mistake, in which event he might withhold the name of the applicant and report the same to Congress.

In the note to the report of the case in 2 Dall. it appeared that Chief Justice Jay, Mr. Justice Cushing and District Judge Duane unanimously agreed.

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit Courts, by this act, are not of that description, and that the act itself does not appear to contemplate them
*353 as such; inasmuch as * it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

A further history of the case—and of another brought under the same act but unreported—will be found in *United States* v. *Ferreira,* 13 How. 40, in which the opinion of the court was by the Chief Justice, and the note by him on page 52 was inserted by order of the court. Concluding that note it was said:

"In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate."

In the *Ferreira case* this court determined the effect of proceedings under an act of Congress, authorizing the District Judge of the United States for the Northern District of Florida to receive and adjudicate claims for losses for which this Government was responsible under the treaty of 1819 between the United States and Spain; decisions in favor of claimants, together with evidence given in connection therewith, to be reported to the Secretary of the Treasury, who, being satisfied that the same were just and equitable and within the treaty,
*354 was to pay the amount thereof. It was held that an award of the * District Judge under that act was not the judgment of a court and did not afford a basis of appeal to this court.

In 1793, by direction of the President, Secretary of State Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which *"do not give a cognizance of them to the tribunals of the country."* The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a

court of last resort, afforded strong arguments against the propriety of extra-judicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the executive departments." Correspondence & Public Papers of John Jay, vol. 3, p. 486.

The subject underwent a complete examination in the case of *Gordon* v. *United States,* reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his last judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the Court of Claims and thence by appeal to this court, the judgment, however,
*355 not to be paid until an appropriation had been estimated therefor * by the Secretary of the Treasury; and, as was said by the Chief Justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Concluding his discussion of the subject, the Chief Justice said, after treating of the powers of the different branches of the Government, and laying emphasis upon the independence of the judicial power as established under our Constitution, p. 706: "These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

At the last term of the court, in the case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below.
*356 In that case former cases were reviewed * by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appro-

priate legislation upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller on the Constitution, 314.

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies"? A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison,* 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy"? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission,* 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that
*357 it is less comprehensive * than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia, 2* Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." [1]

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power,

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[1] Mr. Justice Field thus continued in the portion of his opinion not quoted by Mr. Justice Day:

"In his Commentaries on the Constitution, Mr. Justice Story says:

"'It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. *When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it.* A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.'

"And Mr. Justice Story refers in a note to the speech of Marshall on the case of Robbins, in the house of representatives, before he became chief justice, which contains a clear statement of the conditions upon which the judicial power of the United States can be exercised. His language was:

"'By extending the judicial power to all cases in law and equity, the constitution has never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by this process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.'"—Editor.

pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury* v. *Madison, supra.*

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and
*358 embodied in the Constitution and an act of the agents * of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury* v. *Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice, in *Osborn* v. *Bank of United States,* 9 Wheat. 819, speaking of the third Article of the Constitution conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of *Cohens* v. *Virginia,* 6 Wheat. 264, Chief Justice Marshall, amplifying and reasserting the doctrine of *Marbury* v. *Madison,* recognized the limitations upon the right of this court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a State of a patent of nobility as a case of that class, and conceding that the court would have no power to annul such a grant, said, p. 405:

"This may be very true; but by no means justifies the inference drawn
*359 from it. The article does not extend the * judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an

interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also in this connection *Chicago & Grand Trunk Railway Company* v. *Wellman,* 143 U. S. 339. On page 345 of the opinion in that case the result of the previous decisions of this court was summarized in these apposite words by Mr. Justice Brewer, who spoke for the court:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It
*360 never was the thought that, by means of a friendly suit, a * party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

*361 * It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen,

is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the
*362 doubtful character * of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be deter-
*363 mined in the exercise of its judicial functions. For * the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the

Constitution under which it was created. As Congress, in passing this act as a part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565; *Employers' Liability Cases*, 207 U. S. 463.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

IV

LAW AND EQUITY; ADMIRALTY AND MARITIME JURISDICTION; INTERNATIONAL LAW.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. (*Constitution of the United States, Article III, Section 2.*)

A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision; if, to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the Judiciary. . . . By extending the Judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit. (*John Marshall's speech on the case of Jonathan Robbins in the House of Representatives, March 7, 1800, Annals of Congress, Vol. 10, p. 606.*)

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. (*Constitution of the United States, Article III, Section 2.*)

The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls. (*Constitution of the United States, Article III, Section 2.*)

The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations. (*Constitution of the United States, Article I, Section 8.*)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (*Constitution of the United States, Article VI.*)

United States v. Hudson and Goodwin.[1]

Supreme Court of the United States, 1812.

[7 *Cranch*, 32.]

The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States.

But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders, &c.

THIS was a case certified from the Circuit Court for the District of *Connecticut*, in which, upon argument of a general demurrer to an *indictment* for a libel on the President and Congress of the United States, contained in the *Connecticut Currant*, of the 7th of May, 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte for leave to make a treaty with Spain, the judges of that Court were divided in opinion upon the question, *whether the Circuit Court of the United States had a common law jurisdiction in cases of libel?*

Pinkney, Attorney General, in behalf of the United States, and Dana, for the Defendants, declined arguing the case.

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by JOHNSON, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute.

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years, has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.

*33 * The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been

[1] February 13th, 1812. Absent, WASHINGTON, Justice.

conferred by any legislative act, if it does not result to those Courts as a consequence of their creation.

And such is the opinion of the majority of this Court: For, the power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects; and when a Court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended—in its nature very indefinite—applicable to a great variety of subjects—varying in every state in the Union—and with regard to which there exists no definite criterion of distribution between the district and Circuit Courts of the same district.

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of
*34 its creation, necessarily results to it. But, * without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of orders, &c., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.[1]

Robinson v. Campbell.

Supreme Court of the United States, 1818.

[3 *Wheaton*, 212.]

By the compact of 1802, settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared that all claims and titles to lands derived

[1] Although there is no federal common law of crimes, it is a settled rule of construction that a term of that law used in a Federal statute is to be understood in the sense of the English common law of crimes, unless otherwise provided. (See *Kepner* v. *United States*, 195 U. S. 100, decided in 1904.)—Editor.

from Virginia, or North Carolina, or Tennessee, which have fallen into the respective states, shall remain as secure to the owners thereof, as if derived from the government within whose boundary they have fallen, and shall not be prejudiced or affected by the establishment of the line. Where the titles, both of the plaintiff and defendant in ejectment were derived under grants from Virginia, to lands which fell within the limits of Tennessee, it was held that a prior settlement right thereto which would, *in equity*, give the party a title, could not be asserted as a sufficient title in an action of ejectment brought in the circuit court of Tennessee.

Although the state courts of Tennessee have decided, that, under their statutes declaring an elder grant founded on a junior entry, to be void, a junior patent founded on a prior entry shall prevail *at law* against a senior patent founded on a junior entry; this doctrine has never been extended beyond cases within the express purview of the statute of Tennessee, and cannot apply to the present case of titles deriving all their validity from the laws of Virginia, and confirmed by the compact between the two states.

The general rule is, that remedies, in respect to real property are to be pursued accord-
*213 ing to the *lex loci rei sitæ*. The acts of the two states * are to be construed as giving the same validity and effect to the titles in the disputed territory as they had, or would have, in the state, by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori*.

The remedies in the courts of the United States, at common law and in equity, are to be, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this doctrine it may be admitted, that where, *by the statutes* of a state, a title, which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be valid at law, is, under circumstances of an equitable nature, declared void, the right of the parties in such case may be as fully considered in a suit at law, in the courts of the United States, as in any state court.

A conveyance by the plaintiff's lessor during the pendency of an action of ejectment, can only operate upon his reversionary interest, and cannot extinguish the prior lease. . . .

In the above case it was held that the statute of limitations of Tennessee was not a good bar to the action, there being no proof that the lands in controversy were always within the original limits of Tennessee, and the statute could not begin to run until it was ascertained by the compact of 1802, that the land fell within the jurisdictional limits of Tennessee.

ERROR to the district court of East Tennessee.

This was an action of ejectment brought by the defendant in error (the plaintiff's lessor in the court below,) against the present plaintiff, and S. Martin, on the 4th of February, 1807, in the district court for the district of East Tennessee, which possessed circuit court powers. The defendants in that court pleaded separately the general issue, as to 400 acres, and disclaimed all
*214 right to the residue of the tract specified * in the declaration. A verdict was given for the plaintiff in October term, 1812. From the statement contained in the bill of exceptions, taken at the trial of the cause, it appeared that the land for which the action was brought, was situate between two lines, run in 1779 by Walker and Henderson, as the boundary lines of Virginia and North-Carolina. The former state claimed jurisdiction to the line run by Walker, and the latter to the line run by Henderson. After the separation of Tennessee from North-Carolina, the controversy between Virginia and Tennessee, as to boundary, was settled, in 1802, by running a line equidistant from the former

lines. The land in dispute fell within the state of Tennessee. Both the litigant parties claimed under grants issued by the state of Virginia, the titles to lands derived from the said state having been protected by the act of Tennessee, passed in 1803, for the settlement of the boundary line.[1]

The plaintiff rested his title on a grant (founded on a treasury warrant) to John Jones, dated August the 1st, 1787, for 3,000 acres; 1,500 acres of which were conveyed to the lessor by Jones, on the 14th of April 1788: and proved possession in the defendant when the suit was commenced.

The defendant, to support his title to the said 400 acres, offered in evidence a grant for the same to Joseph Martin, dated January 1st, 1788, founded on a settlement-right, and intermediate conveyances to himself. He also offered in evidence, that a settlement was made on said land in 1778, by William
*215 Fitzgerald, who assigned his settlement-right to the * said Joseph Martin; that a certificate in right of settlement was issued to Martin by the commissioners for adjusting titles to unpatented lands; on which certificate, and on the payment of the composition money, the above grant was issued. This evidence was rejected by the court below.

The defendant also offered in evidence a deed of conveyance from the plaintiff's lessor to Arthur L. Campbell, dated January 2d, 1810, for the land in dispute; but the same was also rejected.

He also claimed the benefit of the statute of limitations of the state of Tennessee, on the ground that he, and those under whom he claims, had been in continued and peaceable possession of the 400 acres since the year 1788.

The court decided that the statute did not apply.

The cause was then brought before this court by writ of error. . . .

*218 * February 24th, 1818. Mr. Justice Todd delivered the opinion of the court, and after stating the facts proceeded as follows:

The first question is, whether the circuit court were right in rejecting the evidence offered by the defendant to establish a title in himself under the grant of Joseph Martin, that grant being posterior in date to the grant under which the plaintiff claimed; and this depends upon the consideration, whether a prior settlement right, which would, in *equity,* give the party a title to the land, can be asserted also, as a sufficient title in an action of ejectment.

By the compact settling the boundary line between Virginia and Tennessee, and the laws made in pursuance thereof, it is declared, that all claims and titles to lands derived from the governments of Virginia, or North-Carolina, or Tennessee, which has fallen into the respective states, shall remain as secure to the owners thereof, as if derived from the government within whose line they have fallen, and shall not be in any wise prejudiced or affected in consequence of the establishment of the said line. The titles, both of the plaintiff and defendant in this case, were derived under grants from Virginia; and the argument is, that as in Virginia no equitable claims or rights antecedent to the grants could
*219 be asserted in a court of * law in an ejectment, but were matters cognizable in equity only, that the rule must, under the compact between the

[1] For the settlement of this boundary dispute, see *North Carolina* v. *Tennessee* (235 U. S. 1), *post,* p. 1696, decided in 1914; *North Carolina* v. *Tennessee* (240 U. S. 652), *post,* p. 1728, decided in 1916.—Editor.

two states, apply to all suits in the courts in Tennessee, respecting the lands included in those grants.

The general rule is, that remedies in respect to real estate are to be pursued according to the law of the place where the estate is situate. Nor do the
*220 court * perceive any reason to suppose that it was the intention of the legislatures of either state, in the acts before us, to vary the application of the rule in cases within the compact. Those acts are satisfied by construing them to give the same validity and effect to the titles acquired in the disputed territory, as they had, or would have, in the state by which they were granted, leaving the remedies to enforce such titles to be regulated by the *lex fori.*

The question then is, whether in the circuit courts of the United States, a merely equitable title can be set up as a defence in an action of ejectment? *221 It is understood that the state courts of Tennessee have * decided that under their statutes . . . the priority of entries is examinable at law. . . . But this doctrine has never been extended beyond the cases which have been construed to be within the express purview of the statutes of Tennessee. The present case stands upon grants of Virginia, and is not within the purview of the statutes of Tennessee; the titles have all their validity from the laws of Virginia, and are confirmed by the stipulations of the compact. Assuming, therefore, that in the case of entries under the laws of Tennessee, the priority of such entries is examinable at law, this court do not think, that the doctrine applies to merely equitable rights derived from other sources.

There is a more general view of this subject, which deserves consideration. By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law, and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the judiciary act of 1789, it is provided, that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used in suits at common law in the courts of
*222 the United States, and declares that the modes of proceeding in * suits of equity shall be "according to the principles, rules, and usages, which belong to courts of equity, as contra-distinguished from courts of common law," except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress, by these provisions, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief *at law,* where the practice of the state courts would give it, and relief *in equity* only, when according to such practice, a plain, adequate, and complete remedy could not be had at law. In some states in the union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognise and enforce in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent,

would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts
*223 of the United States are to be, at common law or in equity, not * according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country [England] from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that where by the statutes of a state, a title, which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be good at law, is under circumstances of an equitable nature declared by such statutes to be void, the rights of the parties, in such case, may be as fully considered, in a suit at law in the courts of the United States, as they would be in any state court.

In either view of this first point, the court is of opinion that the circuit court decided right in rejecting the evidence offered by the original defendant. It was matter proper for the cognisance of a court of equity, and not admissible in a suit at law.

The next question is, whether the circuit court decided correctly in rejecting the deed of conveyance from the plaintiff's lessor to Arthur L. Campbell, for the land in controversy, made during the pendency of the suit? . . .
*224 In the present case the lease is to * be deemed as a good subsisting lease, and the conveyance by the plaintiff's lessor, during the pendency of the suit, could only operate upon his revisionary interest, and, consequently, could not extinguish the prior lease. . . .

The last question is, whether the statute of limitations of Tennessee was a good bar to the action. It is admited, that it would be a good bar only upon the supposition that the lands in controversy were always within the original limits of Tennessee; but there is no such proof in the cause. The compact of the states does not affirm it, and the present boundary was an amicable adjustment by that compact. It cannot, therefore, be affirmed by any court of law, that the land was within the reach of the statute of limitations of Tennessee until after the compact of 1802. The statute could not begin to run until it was ascertained that the land was within the jurisdictional limits of the state of Tennessee. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.[1]

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[1] In speaking of the sense in which technical terms employed, but not defined, in the Constitution are to be understood, Mr. Justice Gray, in delivering the opinion of the court in *United States* v. *Wong Kim Ark* (169 U. S. 649, 654–5), decided in 1897, said:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett,* 21 Wall. 162; *Ex parte Wilson,* 114 U. S. 417, 422; *Boyd* v. *United States,* 116 U. S. 616, 624, 625; *Smith* v. *Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; Bradley, J., in *Moore* v. *United States,* 91 U. S. 270, 274.

"In *Minor* v. *Happersett,* Chief Justice Waite, when construing, in behalf of the court, the very provision of the Fourteenth Amendment now in question, said: 'The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.' And he proceeded to resort to the common law as an aid in the construction of this provision. 21 Wall. 167.

"In *Smith* v. *Alabama,* Mr. Justice Matthews, delivering the judgment of the court, said:

State of Ohio v. Lafferty.

Court of Common Pleas of the State of Ohio, 1817.

[*Tappan*, 81.][1]

The common law of England, so far as is compatible with our principles and form of government, is a part of the law of Ohio.

Offences at common law are within the jurisdiction of the courts of common pleas.

Selling unwholesome provisions is a crime at common law and may, therefore, be punished in Ohio.

LAFFERTY was convicted, on three several indictments, for selling unwholesome provisions.

Wright, for the defendant, moved, in arrest of judgment "for that there is no law of this state against selling unwholesome provisions." He observed that the indictment was bottomed upon the common law of England, which was not in force in this state, it never having been adopted by our constitution or recognized by our laws or judicial decisions; that the 4th section of the 3d article of the constitution, limited and confined the jurisdiction of the court to offences declared such by the statute laws. He admitted that the offence charged was an offence against the public, which at common law was indictable and punishable where the common law was in force; but that, in this state, as the common law was not in force, and no statute had declared it criminal, it was not an act which could be prosecuted criminally.

Beebe, contra. That the section of the constitution quoted and relied upon by Wright, as limiting the jurisdiction of the court to statutory offences, was not fairly construed; it should be considered as referring the courts to the statute law, for the extent of their several jurisdictions in criminal cases; and so considered the statute law which gave to the Supreme Court jurisdiction in all capital cases, and to the courts of common pleas jurisdiction in all cases not capital, without any specification of indictable offences; did point out the manner and the cases in which this section of the constitution intended the duties of the courts should be divided, and that it did not exclude a common law jurisdiction.

President—The question raised on this motion, whether the common law is a rule of decision in this state? is one of very great interest and importance, and one upon which contradictory opinions have been holden both at the bar and upon the bench.

*82 * No just government ever did, nor probably ever can, exist, without an unwritten or common law. By the common law, is meant those

'There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes.' 'There is, however, one clear exception to the statement that there is no national law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' 124 U. S. 478."—Editor.

[1] In order to show that technical terms employed in the Constitutions and laws of the States of the Union are, like such terms used in the Constitution and laws of the United States, to be understood and interpreted according to the system of law from which they were derived, three leading cases from three of the States of the Union are printed.—Editor.

maxims, principles and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason have, by usage and custom, become interwoven with the written laws; and, by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage life to civilization, order and a government of laws.

For the forms of process, indictment, and trial, we have no statute law directing us; and for almost the whole law of evidence, in criminal as well as in civil proceedings, we must look to the common law, for we have no other guide. Can it be said, then, that the common law is not in force, when, without its aid and sanction, justice cannot be administered; when even the written laws cannot be construed explained and enforced, without the common law, which furnishes the rules and principles of such construction?

We may go further and say, that not only is the common law necessarily in force here, but that its authority is superior to that of the written laws; for it not only furnishes the rules and principles by which the statute laws are construed, but it ascertains and determines the validity and authority of them. It is, therefore, that Lord Hobart said, that a statute law against reason, as to make a man a judge in his own cause, was void.

As the laws of nature and reason are necessarily in force in every community of civilized man (because nature is the common parent, and reason the common guardian of man), so with communities as with individuals, the right of self-preservation is a right paramount to the institution of written law; and hence the maxim, *the safety of the people is the supreme law,* needs not the sanction of a constitution or statute to give it validity and force; but it cannot have validity and force, as law, unless the judicial tribunals have power to punish all such actions as directly tend to jeopardize that safety; unless, indeed, the judicial tribunals are the guardians of public morals and the conservators of the public peace and order. Whatever acts, then, are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only *may* but *must* be repressed and punished, or government and social order cannot be preserved. It is this salutary principle of the common law, which spreads its shield over society, to protect it from the incessant ac-
*83 tivity and novel inventions * of the profligate and unprincipled, inventions which the most perfect legislation could not always see and guard against.

But although the common law, in all countries, has its foundation in reason and the laws of nature, and, therefore, is similar in its general principles, yet in its application it has been modified and adapted to various forms of government; as the different orders of architecture, having their foundation in utility and graceful proportion, rise in various forms of symmetry and beauty, in accordance with the taste and judgment of the builder. It is also a law of liberty; and hence we find, that when North America was colonized by emigrants who fled from the pressure of monarchy and priestcraft in the old world, to enjoy freedom in the new, they brought with them the common law of England (their mother country) claiming it as their birth-right and inheritance. In their charters from the crown they were careful to have it recognized as the foundation on which they were to erect their laws and governments; not more anxious was Æneas to secure from the burning ruins of Troy his household gods, than were these first settlers of America to secure to themselves and their children the benefits of the common

law of England. From thence, through every stage of the colonial governments, the common law was in force so far as it was found necessary or useful. When the revolution commenced, and independent state governments were formed; in the midst of hostile collisions with the mother country, when the passions of men were inflamed, and a deep and general abhorrence of the tyranny of the British government was felt; the sages and patriots who commenced that revolution, and founded those state governments, recognized in the common law a guardian of liberty and social order. The common law of England has thus always been the common law of the colonies and states of North America; not indeed in its full extent, supporting a monarchy, aristocracy and hierarchy, but so far as it was applicable to our more free and happy habits of government.

Has society been formed and government instituted in Ohio, on different principles from the other states in this respect? The answer to this question will be found in our written laws.

The ordinance passed by the congress of the United States, on the 13th of July, 1787, "for the government of the territory of the United States, North West of the river Ohio," is the earliest of our written laws. Possessing the North-western Territory in absolute sovereignty, the United States, by that instrument, provide for the temporary government of the people who may settle
*84 there; and, * to use the language of that instrument, "for extending the fundamental principles of civil and religious liberty, which forms the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states and permanent government therein; and for their admission to a share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest," it was ordained and declared, "that the inhabitants of the said territory shall *always* be entitled to the benefits of the writ of habeas corpus and of the trial by jury; of a proportionate representation of the people in the legislature, *and of judicial proceedings according to the course of the common law,*"—as one of the articles of compact between the original states, and the people and states in the said territory, to remain forever unalterable unless by common consent. Under this ordinance we purchased lands and made settlements, in this then N. Western Territory; we became voluntary parties to this contract, and made it, by our own act, what it was intended to be, "the basis of all our laws, constitutions and government"—and thus the common law became here, as it had become in the earliest colonies, the foundation of our whole system of jurisprudence.

That these articles of compact were of perpetual obligation upon the people and states to be formed in the territory, unless altered by the mutual consent of such states and of the original states, is a position which I have never heard controverted; yet it may not be useless to advert to express recognitions of it by both the contracting parties. First. The United States, by the act of congress entitled "an act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes," under the authority of which Ohio became an independent state, authorized the people of said division to form a constitution and state government, "provided the same shall be republican, and

not repugnant to the ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the river Ohio."

Section 5th.—Second. The people of Ohio by the preamble to their state constitution, declare that they ordain and establish that constitution, "consis-
*85 tent with the * constitution of the United States, the ordinance of congress of 1787, and the laws of congress."

The common law being a part of the existing system of jurisprudence at the time when the state government was formed, and its continuance being expressly provided for by the 4th section of the last article or schedule to this constitution, which declares that "all laws and parts of laws now in force in this territory, not inconsistent with this constitution, shall continue and remain in full effect until repealed by the legislature." We will next examine the power of this court to enforce it.

The 1st section of the 3d article of the constitution declares, that "the judicial power of the state, both as to matters of law and equity, shall be vested in a Supreme Court, in courts of common pleas for each county," etc. The 2d section declares, that the Supreme Court "shall have original and appellate jurisdiction, both in common law and chancery, in such [cases] as shall be directed by law;" and the 3d section, that "the court of common pleas shall have common law and chancery jurisdiction in all such cases as shall be directed by law." These sections refer to future legislative provision to mark the boundaries of jurisdiction between the court of common pleas and the Supreme Court, and to fix their extent; but they do not refer to such provision, to point out the particular wrongs which may be redressed by petition in equity, by private suit or by criminal prosecution. Such has been the uniform construction of these sections by the legislature, since the constitution was formed, as must be evident from the fact that no statute law has ever been made or projected to detail those wrongs, private or public, which the judicial tribunals were to redress by virtue of their chancery powers, or "according to the course of the common law;" such a statute would indeed be a phenomenon, the result of a more perfect legislation than man has yet attained to.

But it has been urged, that the 4th section of the 3d article is the only part of the constitution which gives this court jurisdiction in criminal cases, and that it expressly refers to future statutory provision, to point out the *cases* in which such jurisdiction may be exercised. The language of this section is: "The judges of the Supreme Court and courts of common pleas shall have complete criminal jurisdiction, in such cases, and in such manner, as may be pointed out by law."

The laws in existence at the time when the constitution was formed,
*86 20th Nov., 1802, and the state government commenced * (beside those of the United States) were the common law, the statutes of other states adopted by the governor and judges of the territory, and the acts of the territorial legislatures; all which were continued in force by the constitution. This section of the constitution, by giving jurisdiction in matters of crime, *"in such cases and in such manner as may be pointed out by law,"* must mean, in such cases and in such manner as may be now or hereafter pointed out by law; for it must either intend to give the court jurisdiction according to the then existing laws or to require of the legislature an immediate and perfect criminal code, and so operate as a repeal of the former; it could not intend the latter, because neither a con-

vention or legislature can ever be construed to have exceeded their power, unless such intent is clearly and positively expressed; and so far is such intent from being expressed, by the section referred to, that the utmost latitude of construction leaves the intent that way ambiguous. It must intend the former: 1st. Because the convention who framed the constitution, were limited in their powers by the ordinance and law of congress; they had not power to deprive the people of Ohio of the benefit of judicial proceedings according to the course of the common law. 2d. Because the convention intended the constitution to be consistent with the ordinance and law. And 3d. Because the constitution expressly continues in force all existing laws.

Such seems ever to have been the opinion of the legislature of this state; for the first general assembly which sat under the constitution, passed an act to fix the extent of jurisdiction in the courts, and gave to the common pleas "cognizance of all crimes, offences and misdemeanors, the punishment whereof is not capital." 1st vol. stat. laws, 40. But neither the first nor second general assembly deemed it necessary to make any material alteration in the criminal code they had received from the territorial government; nor had the state any other criminal laws until the first of August, 1805. And when the state courts superseded the territorial, they were required, "agreeable to their respective jurisdictions," to "take cognizance of all judgments, causes and matters whatsoever, whether civil or criminal, that are now pending, undetermined or unsatisfied," in the territorial courts; and they were "authorized and required to hear and decide upon the said matters." 1st vol. stat. laws, 50. In prosecutions at common law, then depending in the territorial courts, the state courts there thus directed to take cognizance, to hear and decide upon them, "according to the course of the common law."

*87 * But suppose that the position is a correct one, that the principles of the common law have no force or authority in this state, and what are the consequences? They are these: That there are no legal forms of process, of indictments or trial; there is no law of evidence and the statute laws cannot be enforced, but must remain inoperative from the uncertain signification of the terms used in defining criminal offences. Beside, the constitution gives jurisdiction to this court in criminal matters, "in such cases and in *such manner as may be pointed out by law;*" and as we have no statute pointing out the manner in which such jurisdiction shall be exercised, the consequence follows that it cannot be lawfully exercised in any manner whatever. of indictment or trial; there is no law of evidence; and the statute laws cannot

On the whole, therefore, it may be concluded, that were the written laws wholly silent on the subject, the principles and maxims of the common law must, of necessity, be the rule and guide a judicial decision in criminal as well as in civil cases; to supply the defects of a necessarily imperfect legislation, and to prevent "the will of the judge, that law of tyrants," being substituted in the room of known and settled rules of law in the administration of justice.

And that by the ordinance of congress, the constitution and laws of the state, a common law jurisdiction in criminal cases is established and vested in this court. The motion in arrest is, therefore, overruled.

The defendant was fined $50 in each case, with costs.

Commonwealth v. Chapman.

Supreme Court of the State of Massachusetts, 1848.

[13 *Metcalf*, 68.]

The publication of a false and malicious libel has always, by the common law of Massachusetts, been an offence punishable by indictment.

This case was argued by *Hallett,* for the defendants, and by *Porter,* (District Attorney) for the Commonwealth. The opinion of the court was delivered, at September term 1848, by

SHAW, C. J. This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case was brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were
*69 governed when they emigrated; or statutes made afterwards, of a * general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman joined with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwriten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are estab-

lished and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious
*70 to require argument, that without the * common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 & *seq.*

If it be asked, "how are these customs or maxims, constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of Massa-
*71 chusetts, usually relied on in * proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, Art. 1, Sect. 6: "All the laws which have been adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution, that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the declaration of independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the
*72 constitution, therefore, though * highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction, as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published reports of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thacher (*Commonwealth* v. *Whitmarsh,* Thacher's Crim. Cases, 441,) that many prosecutions for libel were instituted in the criminal courts before the revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until non prossed by the king's attorney general. This investigation of the history of the common law of Massachusetts is so thorough, complete and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear, satisfactory and decisive; and that is, these rules of law, with some modification,
*73 caused by the * provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the declaration of independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories,
*74 as well in America as * in Great Britain, and so continued applicable till the declaration of independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities; and we are now to inquire, whether by the acts done since the adoption of the constitution—acts of the judiciary and legislature—these laws, with some modification, have not been affirmed and declared in such a manner as to bring them within the provision of the constitution, and make them absolutely binding, until repealed by the legislature. . . .

*78 * These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious

libel a criminal offence, has been adopted in this Commonwealth, entirely conclusive and irrefragable; and he must be a bold judge, who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this State, on convictions for this offence, have been erroneous.

Exceptions overruled.

Callanan v. Judd.

Supreme Court of the State of Wisconsin, 1868.

[23 *Wisconsin,* 343.]

1. When our state constitution was adopted, the determination of questions of fact in equity cases was an exercise of the *judicial* power.
2. Chapter 79, Laws of 1867, which prohibits courts from trying any action to foreclose a mortgage in which there are issues of fact, without the intervention of a jury, except upon the written stipulation of the parties, and gives to the verdict the same force and effect as in actions at common law, is invalid, being in conflict with section 2, article 7 of the state constitution, which vests in the *courts* the judicial power of the state both as to matters of law and equity. . . .

APPEAL from the Circuit Court for *Dodge* County.

Action upon a mortgage executed by the defendant *Judd,* in June, 1855, to the La Crosse and Milwaukee Railroad Company, as security for his note of the same date. The note and mortgage were attached to the bond of the company, and, by the terms of said bond, were assigned to the holder thereof as security for its payment; and plaintiff claimed as owner of the bond. . . .

*346 * Verdict for the defendant; new trial denied; and judgment upon the verdict; from which the plaintiff appealed. . . .

*348 * PAINE, J. This being an action to foreclose a mortgage, and having been tried with a jury, the respondent's counsel claims for their verdict the conclusive effect given by chapter 79, Laws of 1867. That act prohibits courts from trying an action to foreclose a mortgage in which there are issues of fact, without the intervention of a jury, except upon the written stipulation of the parties; and gives to the verdict the same force and effect as in actions at common law. It professes to divest the courts of all jurisdiction to try any action for foreclosure, except as therein provided. If the act is valid, of course the verdict is to have the same effect as in an action at law, otherwise not.

I think the act invalid, and my reasons are briefly as follows: The power to decide questions of fact, in equity cases, belonged to the chancellor, just as much as the power to decide questions of law. It was an inherent part, and one of the constituent elements, of equitable jurisdiction. If, therefore, it shall appear that, by the constitution, the equitable jurisdiction existing in this state is vested in the courts, I think it will necessarily follow that it would not be

competent for the legislature to divest them of any part of it, and confer it upon juries. If they can do so as to a part, I do not see why they may not as to the whole. If they can say that in an equity case no court shall render any judgment except upon the verdict of a jury on questions of fact, I can see no reason why they may not say that the jury shall also be allowed to decide the questions of law.

But the constitution, in section 2, article 7, provides that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate and justices of the peace. The *349 legislature may * also vest such jurisdiction as shall be deemed necessary, in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction."

In order to determine the meaning of the phrase "judicial power as to matters of law and equity," it is only necessary to recur to the system of jurisprudence established in this country and derived from England, in which the courts had certain well-defined powers in those two classes of actions. In actions at law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the constitution, therefore, vested in certain courts judicial power in matters at law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood. But, to remove all doubt, in actions at law the right of a trial by jury is expressly preserved by another provision.

But, as already stated, the power of a court of chancery to determine questions of fact, as well as of law, was equally well established and understood. And when the constitution vested in certain courts judicial power as to matters in equity, it clothed them with this power, as one of the established elements of judicial power in equity, so that the legislature cannot withdraw it and confer it upon juries.

I do not think the provision of section 8, article 7, relied on by the respondent's counsel, has any bearing on the question. That is as follows: "The circuit court shall have original jurisdiction in all matters, civil and criminal, within this state, not excepted in this constitution, *and not hereafter* *350 *prohibited * by law,* and appellate jurisdiction from all inferior courts and tribunals and a supervisory control over the same."

It is claimed that this contains a clear implication that the legislature may prohibit to the circuit courts such original jurisdiction as it sees fit. But it is obvious that there is no design hidden under this implication to authorize the legislature to disturb the constituent elements of the judicial power, as between the court and the jury; and, while leaving the court jurisdiction of the case, to withdraw its judicial power from it and vest it in the jury. This would be readily conceded, if, under the pretended authority of this section, the legislature should enact that all questions of law should be decided by the jury. But such an act would clearly be valid, if it was the design of this section to give the legislature an unrestricted discretion over this whole matter, as is claimed.

The plain object of this provision was to enable the legislature to distribute the jurisdiction in both matters at law and in equity, as between the circuit courts and the other courts in the state, giving to the circuit courts such original jurisdiction and such appellate jurisdiction as it might see fit. But the jurisdiction there intended was jurisdiction of the suit.

It may well be that the legislature may deprive the circuit courts of original jurisdiction in actions for the foreclosure of mortgages. It is unnecessary to determine whether it could or not. But it is quite certain that this clause contains no authority for it, while leaving those courts jurisdiction of this class of actions, to attempt to withdraw from them an acknowledged part of the judicial power and vest it in the jury.

Under the old equity system, the chancellor might at any time refer questions of fact to a jury, but it was merely to inform his conscience. He might if he saw fit, disregard their verdict, and take it upon himself to dispose of the questions of fact absolutely, as he could have done in the first instance.
*351 And I think the verdict here is entitled to no greater force and * effect than it would have had in an equity case independently of this act of 1867.

The whole question was determined by this court in the case of *Freeman* v. *McCollum and others,* 20 Wis. 360, where, notwithstanding an express provision in the act of 1864, requiring the courts to submit issues of fact in these cases to a jury, the court decided that the circuit court was not bound to submit such issues to a jury unless it saw fit. . . .

I think, therefore, the evidence fails to show any legal defense to
*354 this action, if it had been brought by the company. And * the motion of the plaintiff for judgment ought to have been granted.

By the Court.—The judgment is reversed, and the cause remanded with directions to enter judgment for the plaintiff in accordance with the prayer of the complaint.

Doane's Administrators v. Penhallow.

Federal Court of Appeals in Cases of Capture, 1783.

[3 *Dallas,* 54.]

In the case of capture an appeal lies from the Court of Admiralty of one of the States to the Commissioners of Appeal and to the Court of Appeals in Cases of Capture established by the United States in Congress assembled, in accordance with the 9th of the Articles of Confederation.

The said Commissioners of Appeal or the Court of Appeals may reverse the decision of the State court.[1]

It appears, that on the 25th of *November,* 1775 (1 *Jour. Congress,* 259) Congress passed a series of Resolutions respecting captures. These Resolutions are as follows:

"Whereas it appears from undoubted information, that many vessels, which had cleared at the respective Custom-houses in these Colonies, agreeable to the regulations established by Acts of the *British* Parliament, have, in a lawless manner, without even the semblance of just authority, been seized by his Majesty's ships of war, and carried into the harbour of *Boston,* and other ports, where they have been rifled of their cargoes, by order of his Majesty's naval and military officers, there commanding, without the said vessels having been proceeded against by any form of trial, and without the charge of having offended against any law.

"And whereas orders have been issued in his Majesty's name, to the commanders of his ships of war, to proceed as in the case of actual rebellion against such of the sea-port towns and places being accessible to the king's ships,
*55 in which any troops shall be raised or military works erected, * under colour of which said orders, the commanders of his majesty's said ships of war have already burned and destroyed the flourishing and populous town of *Falmouth,* and have fired upon and much injured several other towns within the United Colonies, and dispersed at a late season of the year, hundreds of helpless women and children, with a savage hope, that those may perish under the approaching rigours of the season, who may chance to escape destruction from fire and sword, a mode of warfare long exploded amongst civilized nations.

"And whereas the good people of these colonies, sensibly affected by the destruction of their property and other unprovoked injuries, have at last determined to prevent as much as possible a repetition thereof, and to procure some reparation for the same, by fitting out armed vessels and ships of force. In the execution of which commendable designs it is possible, that those who have not been instrumental in the unwarrantable violences above mentioned may suffer, unless some laws be made to regulate, and tribunals erected competent to determine the propriety of captures. Therefore resolved,

"1. That all such ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war, against the United Colonies, and shall fall into the hands of, or be taken by, the inhabitants thereof, be seized and forfeited to and for the purposes herein after mentioned.

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[1] The statement of facts of the case has been taken as reported by Mr. Justice Paterson in his opinion in the Supreme Court of the United States in the subsequent phase of the case, entitled *Penhallow et al.* v. *Doane's Administrators* (3 Dallas, 54), decided in 1795.—Editor.

"2. Resolved, That all transport vessels in the same service, having on board any troops, arms, ammunition, cloathing, provisions, military or naval stores of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions or other necessaries to the *British* army or armies, or navy, that now are, or shall hereafter be within any of the United Colonies, or any goods, wares, or merchandize for the use of such fleet or army, shall be liable to seizure, and with their cargoes shall be confiscated.

"3. That no master or commander of any vessel shall be entitled to cruize for, or make prize of any vessel or cargo, before he shall have obtained a commission from the Congress, or from such person or persons as shall be for that purpose appointed, in some one of the United Colonies.

"4. That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect Courts of Justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in
*56 * such case be had by a Jury under such qualifications, as to the respective legislatures shall seem expedient.

"5. That all prosecutions shall be commenced in the court of that Colony, in which the captures shall be made, but if no such court be at that time erected in the said colony, or if the capture be made on open sea, then the prosecution shall be in the court of such Colony as the captor may find most convenient; provided that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any Colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbor of the same.

"6. That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof.

"7. That when any vessel or vessels, shall be fitted out, at the expence of any private person or persons, then the captures made, shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the United Colonies, then one third of the prize taken shall be to the use of the captors, and the remaining two thirds to the use of the said Colony, and where the vessels so employed, shall be fitted out at the continental charge, then one third shall go to the captors, and the remaining two thirds, to the use of the United Colonies; provided nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one-half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made."

That, on the 23d March, 1776, Congress resolved that the inhabitants of these colonies be permitted to fit out armed vessels, to cruise on the enemies of the United Colonies.

That, on the 2d April, 1776, Congress agreed on the form of a commission

to commanders of private ships of war; that the commission run in the name of the Delegates of the *United Colonies of New-Hampshire, &c. and was signed by the President of Congress.*

That, on the 3d *July,* 1776, the Legislature of *New-Hampshire,*
*57 * passed an act for the trial of captures; of which the part material in the present controversy, is as follows:

"And be it further enacted, That there shall be erected and constantly held in the town of *Portsmouth,* or some town or place adjacent, in the county of *Rockingham,* a court of justice, by the name of the Court Maritime, by such able and discreet person, as shall be appointed and commissioned, by the Council and Assembly, for that purpose, whose business it shall be to take cognizance, and try the justice of any capture or captures, of any vessel or vessels, that have been, may or shall be taken, by any person or persons whomsoever, and brought into this colony, or any recaptures, that have or shall be taken and brought thereinto. . . .

*59 * "And whereas, the honorable Continental Congress have recommended, that in certain cases an appeal should be granted from the court aforesaid. . . .

*60 * "And whereas no provision has been made by any of the said resolves for an appeal from the sentence or decree of the said Judge, where the caption of any such vessel or vessels may be made by a vessel in the service of the United Colonies, and of any particular colony, or person together:

"Therefore be it enacted by the authority aforesaid: That in such cases, the appeal shall be allowed to the then next superior Court as aforesaid: Provided the Appellant shall enter into bonds with sufficient sureties to prosecute his appeal with effect. And such superior Court, to which the appeal shall be, shall take cognizance thereof, in the same manner as if the appeal was from the inferior Court of Common Pleas, and shall condemn or acquit, such vessel or vessels, their cargoes, and appurtenances, and in the sale, and disposition of them, proceed according to this act. And the Appellant shall pay the court, and jury, such fees as are allowed by law in civil actions."

That, on the 30th *January,* 1777, Congress resolved, that a standing committee, to consist of five members, be appointed, to hear and determine upon Appeals brought against sentences passed on libels in the courts of Admiralty in the respective states.

That *Joshua Stackpole,* a citizen of *New-Hampshire,* commander of the armed brigantine called the *M'Clary,* acting under the commission and authority of Congress, did, in the month of *October,* 1777, on the high seas, capture the brigantine *Susanna,* as lawful prize.

That *John Penhallow, Joshua Wentworth, Ammi R. Cutter, Nathaniel Folsom, Samuel Sherburne, Thomas Martin, Moses Woodward, Niel M'Intire, George Turner, Richard Champney, and Robert Furness,* all citizens of *New-Hampshire,* were owners of the brigantine *M'Clary.*

That *George Wentworth* was agent for the captors.

That, on the 11th *November,* 1777, a libel was exhibited to the Mari-
*61 time Court of *New Hampshire,* in the names of *John * Penhallow* and *Jacob Treadwell,* in behalf of the owners of the *M'Clary,* and of *George Wentworth,* agent for the captors, against the *Susanna,* and her cargo; to which

claims were put in by *Elisha Doane, Isaiah Doane,* and *James Shepherd,* citizens of *Massachusetts.*

That, on the 16th *December,* 1777, a trial was had before the said court, when the Jury found a verdict in favor of the Libellants; whereupon judgment was rendered, that the *Susanna,* her cargo, &c. should be forfeited, and deemed lawful prize, and the same were thereby ordered to be distributed according to law.

That an appeal to Congress was, in due time, demanded, but refused by the said court, because it was contrary to the law of the State.

That then the said Claimants prayed an appeal to the superior Court of *New Hampshire,* which was granted.

That, on the first *Tuesday* of *September,* 1778, the superior Court of *New Hampshire,* proceeded to the trial of the said appeal, when the Jury found in favour of the Libellants; that thereupon the court gave judgment, that the *Susanna,* with her goods, claimed by *Elisha Doane, Isaiah Doane,* and *James Shepherd,* were forfeited to the Libellants, and the same were ordered to be sold at public vendue, for their use and benefit, and that the proceeds thereof, after deducting the costs of suit, and charges of sale, be paid to *John Penhallow* and *Jacob Treadwell,* agents for the owners, and to *George Wentworth,* agent for the captors, to be by them paid and distributed according to law.

That the claimants did, in due time, demand an appeal from the said sentence to Congress, and did also tender sufficient security or caution to prosecute the said appeal to effect, and that the same was lodged in Congress, within forty days after the definitive sentence was pronounced in the superior court of *New Hampshire.*

That, on the ninth of October, 1778, a petition from *Elisha Doane* was read in Congress, accompanied with the proceedings of a Court of Admiralty for the State of *New Hampshire,* on the libel, *Treadwell* and *Penhallow,* versus brig *Susanna,* &c., praying, that he may be allowed an appeal to Congress; whereupon it was ordered, that the same be referred to the committee on appeals. *Fourth Journal of Congress,* 586.

That, on the 26th *June,* 1779, the commissioners of appeal, or the Court of Commissioners, gave their opinion, that they had jurisdiction of the cause.

That the articles of confederation bear date the 9th *July,* 1778, and were ratified by all the states on the 1st March, 1781.

*62 * That, by these articles, the *United States* were vested with the sole and exclusive power of establishing courts for receiving and determining finally appeals in all cases of capture.

That such a court was established, by the style of "The Court of Appeals in cases of capture." By the commission, the Judges were "to hear, try, and determine all appeals from the Courts of Admiralty in the States respectively, in cases of capture." *6th Journal of Congress,* 14, 21, 75.

That, on the 24th *May,* 1780, Congress resolved, "That all matters respecting appeals in cases of capture, now depending before Congress, or the Commissioners of Appeals, consisting of Members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and determined according to law."

That in the month of *September,* 1783, the Court of Appeals, before whom appeared the parties by their advocates, did, after a full hearing and solemn

argument, finally adjudge and decree, that the sentences or decrees passed by the inferior and superior Courts of Judicature of *New Hampshire,* so far as the same respected *Elisha Doane, Isaiah Doane,* and *James Shepherd,* should be revoked, reversed, annulled, and that the property, specified in their claims, should be restored, and that the parties each pay their own costs on the said appeal.[1]

Glass, et al., Appellants, vs. The Sloop Betsey, et al.

Supreme Court of the United States, 1794.

[3 *Dallas,* 6.]

The admiralty jurisdiction exercised by the consuls of France, in the United States, was not of right; such jurisdiction could only be exercised by virtue of a treaty.

The district courts possess all the powers of courts of admiralty, both instance and prize; and may award restitution of property claimed as prize of war, by a foreign captor.

Captain *Pierre Arcade Johannene,* the commander of a French privateer, called the *Citizen Genet,* having captured *as prize,* on the high seas, the sloop *Betsy,* sent the vessel into *Baltimore;* but upon her arrival there, the owners of the sloop and her cargo filed a libel in the District Court of *Maryland,* claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned, jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed; the Circuit Court affirmed the decree; and, thereupon, the present appeal was instituted.

The general question was—Whether under the circumstances of this case, an American Court of Admiralty, has jurisdiction to entertain the complaint, or libel, of the owners, and to decree restitution of the property? It was argued by *E. Tilghman* and *Lewis,* for the appellants; and by *Winchester* (of *Maryland*) and *Du Ponceau,* for the appellee.

For *the Appellants,* the case was briefly opened, upon the following principles. The question is of great importance; and extends to the whole judicial authority of the United States; for, if the admiralty has no jurisdiction, there can be no jurisdiction in any common law court. Nor is it material to distinguish the ownership of the vessel and cargo; since strangers, or aliens, in amity, are entitled equally with Americans to have their property protected by the laws.

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[1] In *Penhallow, et al.* v. *Doane's Administrators* (3 Dallas, 54), decided in 1795, it was held that the Congress under the Confederation had power to erect a court of appeals in prize causes, that its decrees were conclusive, and that the district courts of the United States created under the Constitution have, as courts of admiralty, power to carry into effect the decrees of the former court of appeals in prize causes erected by the Congress of the Confederation.

In the case of *Jennings* v. *Carson* (4 Cranch, 2), decided in 1807, the Supreme Court had occasion to reconsider the extent to which a decision of the Federal Court of Appeals, created by Congress in accordance with the 9th of the Articles of Confederation, was to be regarded as final and subject to execution by the courts of the United States created under the Constitution. This case, therefore, can be taken as in the nature of an appeal from *Penhallow* v. *Doane* (3 Dallas, 54), decided in 1795, and, as stated in the headnote, the Supreme Court held, per Marshall, Chief Justice, that "the district courts of the United States are courts of prize, and have power to carry into effect the sentences of the old continental courts of appeal in prize cases."—Editor.

Vatt. B. 2 s. 101, 103, *p.* 267. There can be no doubt that this is a civil cause of admiralty and maritime jurisdiction, and so within the very terms of the judicial act. Restitution, or no restitution, is the leading point; that necessarily, indeed, involves the point of prize, or no prize, as a defence for capturing; but if the admiralty is once fairly possessed of a cause, it has a right to try every incidental question. That the vessel is a legal prize, may be a good plea to the suit; but it is not a good plea to the jurisdiction of the court; and the captor by bringing his prize into an American port, has himself submitted to the American jurisdiction, which is in this instance to be exercised by the Judicial, not the Executive, department. *Const. U. S. art.* 3, *s.* 1. *Jud. Act. s.* 9. *Doug.* 580, 84, 5. 592. 4. *Carth.* 474. 1 *Sid.* 320. 3 *T. Rep.* 344. 4 *T. Rep.* 394, 5. *Skyn.* 59. *T. Ray.* 473. *Carth.* 32. 6 *Vin. Abr.* 515. 3 *Bl. Com.* 108. 1 *Vent.* 173. 2 *Saund.* 259. 2 *Keeb.* 829. *Lev.* 25. *Sid.* 320. 4 *Inst.* 152. 154. 2 *Bulsb.* 27, 8, 9. 2 *Vern.* 592. 3 *Bl. C.* 108, 2 *L. Jenk.* 755, 727, 733, 751, 754, 755, 780.

*7 * For *the Appellees.* . . .

1. The District Court has no jurisdiction by the Constitution and laws of the United States (which form the only possible source of Federal jurisdiction) for, although it is admitted, that by the 1st and 2d sections of the 3d article of the Constitution, and the Judicial act, the jurisdiction of the District Court extends to all *civil causes* of admiralty and maritime jurisdiction; yet, it is denied, that *prize* is a *civil cause* of that description; nor can the expression vest a power in the District Court to decide the legality of a prize, even by a citizen of the United States. A citizen, indeed, can only make a prize when the United States are *at war* with some foreign power; but being *at peace* with all the world, no such question can now be agitated; and, of course, no jurisdiction, in such a case, can exist in any of its courts. By comparing the act of Congress with the Constitution, it is obvious, that the former does not vest in the District Court, *the same,* or *so extensive,* a judicial power, as the latter would warrant. The Constitution embraces admiralty cases of whatever kind,—whether civil, or criminal, done in time of peace, or in time of war; but the act of Congress limits the power of the District Court to *civil causes* of admiralty and maritime jurisdiction; and the court can have no other, or greater power, than the act has given. *Civil causes* cannot possibly include captures, or the legality of a prize which can only be made *in time of war.* The words are used to denote that the causes are not to be *foreign* causes, or arising from, and determinable

*8 by, the * *jus belli;* but are such as relate to the community, arising in the time of peace, and are determinable by the *civil or* [*m*]*unicipal* law; whereas *prize* is not a *civil* marine cause; nor is it a subject of *civil* jurisdiction. *Doug.* 2 *Ruth. Inst.* 595. The jurisdiction of the admiralty courts of *England,* and of the United States, arises from the same words; but it is manifest, that the latter has no other jurisdiction by law, than that which has been exercised by the *Instance* court in *England,* which is widely different from the *prize* court, though the powers are usually exercised by the *same* person. The *prize* court can only have continuance during *war,* and derives its powers from the warrant which calls it into activity. *Doug.* 613. 2 *Woodes.* 452. *Collect. Jurid.* 72. The *Instance* court derives its jurisdiction from a commission, enumerating particularly every object of judicial cognizance; but not a word of prize; any more than is contained in the act of Congress, when enumerating the objects of judicial cognizance in the district court. The manner of proceeding in these courts is totally different. The question of prize, or no prize, is the boundary line, and not the locality; and the nature of that question not only excludes the *Instance,* but the *common law,* and *all other courts;* so that whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court.

Besides, Congress have not yet declared the rules for regulating captures on land, or water; (*Const. art.* 1. *sec.* 8.) and if the district court is now a court of prize, it is a court *without rules, to determine what is, or what is not, lawful prize;* for, the rules of an *Instance* court will not apply. If, upon the whole, the district court has no jurisdiction, under the act of Congress, of a case of *prize* by a citizen of the *United States,* it cannot have jurisdiction of a *prize* by a citizen of *France,* which is the question raised by the libel. . . .

THE COURT, having kept the cause under advisement for several days, informed the counsel, that besides the question of jurisdiction as to the District Court, another question fairly arose upon the record,—whether any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies? Though this question had not been agitated, THE COURT deemed it of great public importance to be decided; and, meaning to decide it, they declared a desire to hear it discussed. *Du Ponceau,* however, observed, that the parties to the appeal did
*16 not conceive themselves interested in * the point; and that the French minister had given no instructions for arguing it. Upon which, JAY, *Chief Justice,* proceeded to deliver the following unanimous opinion.

BY THE COURT: The Judges being decidedly of opinion, that every District Court in the *United States,* possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court,[1] and that the plea of the

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[1] *Jennings* v. *Carson* (1 Peters Admiralty, 1), decided in 1793 in the District Court of Pennsylvania, involving the execution of a judgment of the Federal Court of Appeals reversing the decree of the Admiralty Court of New Jersey, Judge Peters thus considered this question as one of first impression:

"Five points were made by the advocates of the respondents: 1st. The tort dying with the person; 2d. The jurisdiction of this court is not competent, as it is not a prize court; . . .

"The first point being waived, brings the question to the competency of jurisdiction, which, in order, as well as necessity, should be the first point considered, because, if the court has no jurisdiction, it is nugatory to inquire into the merits of the cause. On this point, as it first struck me, I confess, I had doubts. The account given by Lord Mansfield of the arrangement of the court of admiralty in England, as detailed in the case of Lindo *v.* Rodney, produced hesitation, and my respect for the opinion of that great character, as well as the arguments of the advocates, in the present cause, induced a deliberate consideration of the subject. The division of the court of admiralty into two sides, prize and instance, was new to me, and it is allowed not to have been generally known, if at all, by the common lawyers in England, before that case was determined. In this country, it never was known, nor does it appear, that any new commission was ever transmitted to the colonial judge of the admiralty, from Great Britain, before the revolution, in cases of wars between that kingdom and its enemies. I have traced, from records and other authentic information, the proceedings of the admiralty court of Pennsylvania, for a period exceeding fifty years, and I have the best reason for believing, that the practice in other colonies was similar. In all the proceedings, the prize suits are called suits civil and maritime. During the late war, when we assumed and effected our independence, the proceedings were unaltered in this point. . . . I take it, therefore, for granted, because the contrary has not been shown, that in England alone, are these distinct branches of the same court to be found. . . .

"Acting, as we now do, in a national, and not a dependent capacity, I cannot conceive, that we are bound to follow the practice in England, more than that of our own or any other nation. Customs, purely colonial, were parts of our laws, even in the time of our connection with Britain. I need instance only one, viz., that of the mode of conveyance of *feme coverts'* estates, contrary to the laws of England. This is a case at common law, in which we then were, and now are, particularly called to follow their rule and practice in general. The admiralty proceeds from a law which considers all nations as one community, and should not be tied down to the precedent of one nation, though it were more clearly ascertained. I shall, therefore, conclude, that if the powers of an admiralty and maritime

aforesaid Appellee, *Pierre Arcade Johannene,* to the jurisdiction of the District Court of *Maryland,* is insufficient: THEREFORE IT IS CONSIDERED by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said District Court of Maryland, founded thereon, be, and the same is hereby revoked, reversed and annulled.

AND the said Supreme Court being further clearly of opinion, that the District Court of *Maryland* aforesaid, has jurisdiction competent to enquire, and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part (that is whether such restitution can be made consistently with the laws of nations and the treaties and laws of the

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court are delegated by congress to this court, those of a prize court are mixed in the mass of authority with which it is invested, and require no particular specification. They are called forth (if generally delegated) by the occasion, and not by repeated and new interferences of government. Nor do I believe, that even in England, any new authority is vested, though a kind of legal and solemn notice is given of a war, in which subjects for the prize authority of the admiralty may occur. It does not begin with their wars, but was pre-existent. It does not end with the commencement of peace, for their books show it to be exercised at any time afterwards. Government never interferes to put an end to it: how then can its power be repeatedly necessary to begin it? The fact is, it is inherent in a court of admiralty, and not lost, but torpid, like other authorities of the court, when there are no occasions for their exercise.

"But here the question arises, have congress, by their judiciary laws, vested this court with general or special admiralty powers? Congress have authority (delegated by the people in the constitution) in 'all cases of admiralty and maritime jurisdiction.' The words of that part of the judiciary law affecting this subject, in which the authorities of the court are described, will be seen in the 9th section of that law: 'It shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including seizures under laws of impost, navigation or trade of the United States.' It is said, prize or no prize, is a question of military, not of a civil nature; but I find no such distinction in the books; Blackstone, in his division of courts, does not class that of the admiralty as a military, but a maritime court, and it will appear, that the jurisdiction of prize is within its powers, though he points out, in cases of prizes, in the then colonies, that appeals were to members of the privy council and others, in consequence of treaties and domestic arrangements. But, he says, 'the original court to which this question is permitted in England, is the court of admiralty,' without any distinction as to the nature of its powers, whether instance or prize, military or civil. In book 3, p. 108, he mentions the exclusive and undisturbed jurisdiction of the courts of admiralty, in cases of prize; and that court determines, not according to British laws or practice, but 'according to the law of nations.' Should I confine my attention merely to the inquiry, whether this could be classed under the description of a 'civil cause,' I think there were grounds to support the idea of its being comprehended. In the case of Acheson *v.* Everett (Cowp. 382), some light is thrown on this view of the subject, because it appears, that a civil suit may, in substance, but not in form, partake of criminal ingredients. So, by parity of reason, may a civil cause of admiralty and maritime jurisdiction, be mixed with, or grounded on, transactions of a military nature. But I do not think it necessary merely to fix this point. What is, perhaps, of most consequence is, to ascertain the intention of congress, in distributing a power, clearly in them, to their judiciary departments. And what was said by one of the advocates for the libellant, strikes me as being just and proper, viz., that the construction should be made, from a consideration of all the laws on the subject, *in pari materia.* 'The court shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including,' &c., that is, being invested with criminal powers in certain cases, it shall also have civil powers, as opposed to criminal, in admiralty and maritime cases. By recurring to the 12th, 13th, 19th, 21st and 30th sections of the judiciary law, it will appear, that congress meant to convey all the powers (and in the words of the constitution), as they possessed them, in admiralty cases; and actions or suits in these cases can originate only in the district courts.

"For the foregoing reasons, and some others which might be added, I am of opinion, that this court possesses all the powers of a court of admiralty, and that the question of prize is cognisable before it. I have gone thus far into the discussion of this point, because I believe it is the first time it has been agitated in a federal court. I do, therefore, decree, adjudge and determine, that the plea to the jurisdiction of the court, as not being competent to determine on prize questions, be and the same is hereby overruled."—Editor.

United States) THEREFORE IT IS ORDERED AND ADJUDGED that the said District Court of *Maryland* do proceed to determine upon the libel of the said *Alexander S. Glass,* and others, agreeably to law and right, the said plea to the jurisdiction of the said court, notwithstanding.

AND the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the *United States,* but such only as may be warranted by, and be in pursuance of treaties, IT IS THEREFORE DECREED AND ADJUDGED that the admiralty jurisdiction, which has been exercised in the *United States* by the Consuls of *France,* not being so warranted, is not of right.

IT IS FURTHER ORDERED by the said Supreme Court, that this cause be, and it is hereby, remanded to the District Court, for the *Maryland* District, for a final decision, and that the several parties to the same do each pay their own costs.

De Lovio v. Boit & Others.

Circuit Court of the United States for the First Circuit, 1815.

[2 *Gallison,* 398.]

The admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations. The admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of the tide. The like causes are within the jurisdiction of the District Courts of the United States by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction."

A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction.

Courts of common law have a jurisdiction concurrent with the admiralty over maritime contracts.[1]

STORY, J. This is a libel brought in the District Court upon a policy of insurance, alleging it to be a maritime contract, of which that court, as a court of admiralty and maritime jurisdiction, has cognizance. There is a plea to the jurisdiction, and the present question rests solely on the general sufficiency of that plea as a declinatory bar. It has been argued, and now stands for judgment.

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[1] In *Insurance Company* v. *Denham* (11 Wallace, 1, 35), decided in 1870, the Supreme Court had occasion to consider the question before Mr. Justice Story on circuit, and to hold, to quote the headnote "that the contract of marine insurance is a maritime contract, within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts," and to affirm in the following flattering terms the views of Mr. Justice Story:

"The learned and exhaustive opinion of Justice Story, in the case of *De Lovio* v. *Boit,* affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit. In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know. Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct."

In speaking of Mr. Justice Story's decision in *De Lovio* v. *Boit,* a competent authority feels justified in calling it "one of the most elaborate in the annals of the law, exploring and stating at length the history and extent of admiralty jurisdiction—a treatise in itself—an opinion which, in the words of its opponents, 'sucked up jurisdiction like a sponge.'"—Charles Warren, *A History of the American Bar,* 1911, p. 280.—Editor.

I shall make no apology for the length of this opinion. The vast im-
*399 portance and novelty of the questions, which * are involved in this suit, render it impossible to come to a correct decision without a thorough examination of the whole jurisdiction of the admiralty. I shall therefore consider, in the first place, what is the true nature and extent of the ancient jurisdiction of the admiralty; in the next place, how far it has been abridged or altered by statutes, or by common law decisions; and in the last place, what causes are included in the delegation by the constitution to the judicial power of the United States of "all cases of admiralty and maritime jurisdiction."

The admiralty is a court of very high antiquity. It has been distinctly traced as early as the reign of Edward the first.[1] If it be not of immemorial antiquity, as Lord Coke supposes,[2] it is almost certain, that its origin may be safely assigned in some anteriour age.[3] There is strong probability of its existence in the reign of Richard the first, since the Laws of Oleron, which were compiled and promulgated by him on his return from the Holy Land, have always been deemed the laws of the admiralty, and could not have been fully enforced in any other court.[4] And the learned Selden has shewn considerable evidence of its juridical authority in the reign of Henry the first.[5]

*400 * What was originally the nature and extent of the jurisdiction of the admiralty cannot now with absolute certainty be known. It is involved in the same obscurity, which rests on the original jurisdiction of the courts of common law. It seems, however, that, at a very early period, the admiralty had cognizance of all questions of prize; of torts and offences, as well in ports within the ebb and flow of the tide, as upon the high seas; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives, and authorities of the crown, in the British seas. The forms of its proceedings were borrowed from the civil law;[6] and the rules by which it was governed, were, as in every where avowed, the ancient laws, customs and usages of the seas.[7] In fact, there can scarcely be the slightest doubt, that the admiralty of England, and the maritime courts of all the other powers of Europe, were formed upon one and the same common model; and that their jurisdiction included the same subjects, as the consular courts of the Mediterranean.[8] These courts are described in the Consolato del Mare, as having jurisdiction of "all controversies respecting freight; of damages to goods shipped; of the wages of mariners; of the partition of ships by public sale; of jettison; of commissions or bailments to masters and mariners; of debts contracted by the master for the use and necessi-

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[1] Fitz. Avonry, 192—S. C. Selden on Fortescue, 67, note (e) to ch. 32.—Zouch. on Adm. Jurisd. 114.—Spelman's Gloss. voce Admiral.—Godolphin, Adm. Jurisd. 22 to 30.—Exton, Adm. Jurisd. 3.—Seld. De Dom. maris. lib. 2, cap. 16, p. 161.—Id. cap. 24.—12 Co. 79.

[2] Co. Litt. 11, b. 260. b.—Greenway vs. Barker. Godb. R. 260.—2 Brownl. 16.

[3] Godolph. 29.—Burroughs, Sover. of British Seas, 7, 8, 9.—Seld. De Dom. marvis. lib. 2, cap. 14, 15, 16, 24.—2 Brown, Adm. 24.—1 Valin, Comm. 1.

[4] Seld. De Dom. Marvis. lib. 2, cap. 24, p. 206.—Seld. ad Fletam, cap. 8, s. 5.—Godolph. 143 to 146.—Roughton's articles, art. 19, and note C. 16, and C. 17, in Clerks Praxis 121.—Co. Litt. 11, b. 260 b.—3 Reeve's Hist. 198.—Exton, 24, &c. 38.

[5] Seld. De Dom. Marvis. lib. 2, cap. 24, p. 209.

[6] Zouch, 88.—Seld. ad Fletam, cap. 8, s. 4.—Co. Litt. 11, b.

[7] 3 Reeves' Hist. 198.—Exton, 33.—Seld. ad Fletam, cap. 8, s. 5.—6. Vin. abrid. 506, pl. 8.

[8] Exton, 44, 46, 49, 53.—1 Valin, Comm. 1, 120.—Roccus, Assecur. Note 80.—Cleriac. Juris. de la Marine, 191.—Zouch. 87.

ties of his ship; of agreements made by the master with merchants, or by merchants with the master; of goods found on the high seas or on the shore; of the armament or equipment of ships, gallies or other vessels; and generally of all other contracts declared in the customs of the sea."[1]

*401 * In support of these observations, it may not be unfit to trace the early history of the jurisdiction of the admiralty in some of the more ancient records, which have escaped the ravages of time.

The Black Book of the admiralty asserts, that in the reign of Henry the first, and in the time of many kings before,[2] when any man was indicted of felony, the admiral or his lieutenant delivered a capias to the admiral (the marshal) of the court, or the sheriff, to arrest him; and a very particular account is given of the manner of proceeding in case of his avoidance.[3] Hence its existence and criminal jurisdiction may be inferred at that early period.

The celebrated code of maritime laws, commonly called the laws of Oleron, were compiled by Richard the first, as has been already observed, on his return from the Holy Land. Besides these, he promulgated several maritime ordinances at Grimsby for the government of the admiralty.[4]

In the reign of King John, several ordinances were made with reference to the admiralty; particularly the ordinance directing the admiralty to make inquisition of all persons unlawfully taking customs, or the fees called anchorage,[5] and the famous ordinance for striking sail (or veiling the bonnet) in token of the superiority of the British sovereign over the adjacent seas.[6]

*402 * In the reign of Henry the third, the laws of Oleron were ratified and republished.[7]

In the reign of Edward the first, there was a memorable ordinance prohibiting the courts having franchises, &c. from taking cognizance of any plea, exceeding 40 shillings sterling, touching merchants or mariners, as well by deed, as by charter of ships, obligations and other transactions; and farther declaring, that every contract between merchant and merchant, or merchant and mariner beyond sea, or within the flood mark, shall be tried before the admiral and not elsewhere.[8]

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[1] Compare Consolato del Mare, edit. Casaregis, ch. 22.—Cleirac, Us et Cout, Jurisd. de la marine, art. 1, note (3). 192.—Consulat de la mer par Boucher, ch. 22.—Zouch 90.—2 Bro. Adm. 30.

[2] "En temps du premier roy Henry, et en temps de plusieurs rois devant."

[3] See Clerke's Prax.—Rough. Art. 122, note C, 16, 17.—Exton 32.—Seld. De Dom. maris. lib. 2, cap. 24, p. 209.

[4] Prynne on the 4th Inst. 108.—Exton 26, 27, 182.—Clerk. Prax. 113, (C. 18.)

[5] Exton, 28, 29.—Rough. Art. 35, 36. Note C, 26.—Clerk. Prax. 139, 140.

[6] Clerk. Prax. 166.—Burrough, Sovereignty, &c.—Seld. de Dom. lib. 2, cap. 26, p. 215.

[7] 1 Bib. Legum cites Prynne on 4th Inst. 108.—2 Bro. Ad. 39, 40.

[8] "Ordonne estoit a Hastynges par le Roy Edw. le premier et ses seigneurs, que comment divers seigneurs avoient diverses franchises de trier plees ou ports, que leurs seneschaulx ni bailiffs ne tendroient nul plee, s'il touche marchant ou mariner, tant par fait comme par chartre de Nefs, obligacions, et autres faits, coment la somme amonte que a 20*s*. ou a 40*s*. et s' aucun est endite, qu 'il a fait le contraire, et de ce soit convicte, il aura mesme le judement comme dessus est dit." (C. 20)

"Chacun contract fait entre marchant et marchant, ou marchant ou mariner outre la mer, ou dedans le flode mark, sera trie devant l'Admiral, et nenient ailleurs, par ordinance du Roy Edw. et ses seigneurs." (C. 21.) Clerk. Prax. 144.

And in Roughton's Articles the same is thus given. (38) "Item, inquiratur de hiis seneschallis et ballivis quorumcunque Cominorum per costeras maris cominia habentuim, qui

The immemorial jurisdiction of the admiralty is still more emphatically asserted, as to all causes arising upon the British seas, in the record in the Tower entitled "de superioritate maris Angliæ et jure officii admiralitatis in eadem," in the 26th year of the same reign.[1]

*403 * But it is principally in the records of the reign of Edward the third, that our attention should be closely drawn to the nature and extent of the jurisdiction of the admiralty; for to this period has the statute of 13 Rich. 2 explicitly referred.

Edward the third gave to the laws of Oleron their final confirmation;[2] and called a solemn convocation of all the judges of the realm, among other things to retain and preserve the ancient superiority of the British seas, and the official rights of the admiralty.[3]

But the most venerable monument is the Black Book of the admiralty itself, which, though it contains considerable additions of later periods, is gen-

*404 erally agreed to have been * originally compiled in this reign.[4] This book has always been deemed of the highest authority in matters concerning the admiralty. Besides the laws of Oleron at large, it contains an ample view of the crimes and offences cognizable in the admiralty, and also occasional ordinances and commentaries upon matters of prize and maritime torts, injuries and contracts.[5] Among other things, it prohibits the suing of merchants, mariners and other persons at the common law for any thing appertaining to the marine law of

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tenent, vel tenere usurpant, aliquod placitum mercatores vel marinarios concernens, excedens summam 40*s*. &c. Et haec est ordinatio Edvardi primi apud Hastings, regni sui anno secundo. Et Nota, quod quilibet contractus initus et factus inter clacatorem, et mercatorem, marinaruim aut alios, ultra mare, sive intra fluxum maris, vel refluxum, vulgariter dictum flood mark, erit triatus et determinatus coram admirallo, et non alibi, per ordinationem prædictam."—Clerk. Praxis, 143, 144.

[1] Burrough's Sovereign. 8.—Godolph. 28.—4 Inst. 142.—Prynne on 4th Inst. 109.—Selden de Dom. lib. 2. cap. 19, 24, 28.—Exton, 58.

After reciting the immemorial right of the King of England to the sovereignty of the British seas, and the right to make laws to regulate navigation, and to keep the peace, in those seas, it proceeds "Et A de B., admiral de la dit mier, deputey par le roy d'Engliterre et tous les aultres admirals par mesme celui roy d'Engliterre, et ses ancestors, jades roys d'Engliterre, eussent est en paiseable possession de la dit sovereign garde, ove la conisance et justice et tous les aultres appurtenances avantditz, &c. especialment pur empechement metre et justice faire, surete prendre de la pees de tout manere de gentz usantz armes en la dit mier ou menans niefs aultrement appareilles ou garnies, que n'appartient au nief de marchants, et en aultres points, en queux homme poit avoir reasonable cause de suspicion vers eux de robbery ou des aultres mesfaitz."

[2] 2 Brown Adm. 40.

[3] The article stands thus—"Item, ad finem quod resumatur et continuetur, ad subditorum prosecutionem, forma procedendi quondam ordinata et inchoata per avum domini nostri regis (Edvarum 1.) et ejus consilium, ad retinendum et conservandum antiquam superioritatem maris Angliæ et jus officii admirallatus in eodem, quoad corrigendum, interpretandum, declarandum, et conservandum, leges et statuta per ejus antecessores, Angliæ reges, dudum ordinata ad conservandum pacem et justiciam inter omnes gentes nationis cujuscunque per mare Angliæ transeuntes, et ad cognoscendum super omnibus in contrarium attemptatis in eadem, et ad puniendum delinquentes, et damna passis satisfaciendum; quæ quidem leges et statuta per Dominum Richardum, quondam regem Angliæ, in reditu suo a terra sancta correcta fuerunt, interpretata, declarata et in insula Oleron publicata, et nominata in lingua Gallicana "Le Ley Oleroun."—Burrough's Sovereignty. 10.—Selden de Dom. lib. 2, cap. 32, cap. 24.—Godolph. 143.—4 Inst. 144.—Exton, 25, 61.

[4] Exton. ch. 13 and 14, p. 185, 191.—Prynne on 4th Inst. 106, 115.—Preface to Roughton's Articles, Clerk's Praxis, 92.

[5] See Roughton's Articles, Clerk's Praxis, 99. &c. 163, &c.

ancient right.[1] In respect to torts and injuries, the jurisdiction is most explicitly asserted, as well in ports within the ebb and flow of the tide, as upon the high seas, as will appear from the slightest inspection of the articles of the admiralty, and particularly the Inquisition at Queensborough in this very reign. (49 Edw. 3.)[2] And the binding authority of the laws of Oleron and the customs of the sea in the court of admiralty is several times alluded to and enforced in the same inquisition.[3] Indeed, of such high repute were these laws,
*405 that by an ancient edict of France, it was declared, * that the admiralty ought to do justice according to the rights, judgments and usages of Oleron.[4]

As to maritime contracts, the jurisdiction of the admiralty is expressly affirmed in the same book over all such contracts made abroad and within the flood mark.[5] And so to all causes, it is commanded that the admiralty shall do right and justice summarily and by plain process, according to the marine law and the ancient customs of the sea.[6] And here it may be proper to guard against the mistake, that the particulars enumerated in these various regulations and ordinances comprehend and limit the whole extent of the jurisdiction of the admiralty. They cannot legally be considered in any other light, than as occasional directions to a court already existing with general powers, to clear away a doubt, or to enforce more exactly an observance of an existing right or duty.

The commissions too of the judges of the admiralty in this and the preceding reigns evince a very extensive cognizance over maritime transactions, as well in ports as on the high seas. The admiral is frequently styled therein, in reference to his judicial authority, "custos maritimarum partium," "custos portuum cum costra maris," "custos marinæ," "custos portuum et marinæ," "capitaneum et admirallum flotæ marinæ nostræ omnuim marium, et tamquam que portuum, &c. quam aliorum portuum et locorum per costeram maris,";[7] and finally (as in the commission of Robert de Herle in 35 Edward 3,) as having "plenam,
*406 * tenore patentium, potestatem audiendi querelas omnium et singulorum

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[1] (d) "Soit enquis de tous ceulx que empledent aucuns merchant, mariner, ou autre homme quelconque a la commune ley de la terre appartenant a ley marine d'auncien droit.—Soit enquis de tous juges, qui tiennent devant ceulx aucuns plees appartenants par droiture a la Court de l'Admiraltie."—Or as Roughton renders it, "Inquiratur de hiis, qui implacitant aliquos, alibi quam in curia admiralitatis, de his negotiis seu causis, quæ ad forum admiralitatis pertinere noscuntur."—Rough. Art. 18, and note C. 35. D. 51. D. 52.—Clerk's Praxis, 120. Rough. Art. 38.—Clerk's Praxis, 143.

[2] See Rough. Art. 7, D. 26.—Id. 8, D. 27.—Id. 12, D. 87.—Id. 21, D. 65.—Id. 22, D. 66.—Id. 25. D. 45.—Id. 26. D. 47.—Id. 29. D. 50.—Clerk's Praxis. 110. 111. 116, 125, 126, 129, 130, 134.—Exton, 172.

[3] "Soit enquis de tous mariners, qui mettent en violence main, ou battent leur maistres encontre les loys de la mer et statuts d'Oleron sur ce faitz."—Rought. Art. 25. Note D. 45.—Cl. Prax. 129.—Rought. Art. 26, D. 16.—Cl. Prax. 131.

[4] Zouch. 88.

[5] Rought. Art. 38 and C. 21—Clerk. Prax. 143, 144.

[6] "En primes pour faire droit et due justice a toutes parties, si bien poursuyants comme defendants en la Cour de l'Admiraltie, est de faire sommaire et plain process selon loy marisne et anciennes coustumes de la mer. Cl. Praxis, 160, D. 71.

[7] Exton, 15, 70, 76.—Seld. de Dom. lib. 2, cap. 14.

de hiis quæ officium admiralli tangunt et cognoscendi in causis maritimas, &c."[1]

Such are some of the relics of antiquity, which are to be found in the learned treatises on the admiralty jurisdiction. From a historical review of them; from the consideration that in all other states in Europe, maritime courts were about the same period established, possessing the same jurisdiction, viz., over all maritime forts, offences, and contracts, proceeding by the same forms, viz. the forms of the civil law, and regulated by the same principles, viz. the ancient customs of the sea; from the consideration, that commercial convenience, and even necessity, at the same period, required a court of as extensive jurisdiction in England, and the acknowledged fact, that from its earliest traces the admiralty of England is found exercising a very extensive maritime authority, governed by the rules and forms of proceeding of the civil law, and, where statutes were silent, by the usages of the sea; from all these considerations it has been inferred, and, in my judgment, with irresistible force, that its jurisdiction was coeval and coextensive with that of the other foreign maritime courts.

At all events, it cannot be denied upon these authorities, that before and in the reign of Edward the third, the admiralty exercised jurisdiction, 1. Over matters of prize and its incidents. 2. Over forts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the *407 laws of Oleron and other * special ordinances, and 4. (as the commission of Robert de Herle shows) Over maritime causes in general. And even Lord Coke admits, that maritime causes include causes arising upon the seashore and in ports; for he declares "maritima est super littus or in portu maris."[2]

That this jurisdiction was, from its original establishment, exclusive of the courts of common law in all cases, may perhaps admit of doubt; for it appears from some early cases, on which we shall have hereafter occasion to comment, that the courts of common law did, in some few instances, assume authority to adjudicate upon cases arising upon the seas. But that there is any authority previous to the 13 Richard 2, which, properly considered, impeaches the jurisdiction of the admiralty, as here asserted, may be with some confidence denied.

Let us now proceed to consider such cases, as have been supposed to impugn or weaken the conclusions, which have been attempted to be drawn thus far in favour of the admiralty. And here we must rest altogether upon the citations of Lord Coke in his view of the admiralty jurisdiction in his fourth Institute.[3] It is well known with what zeal, ability, and diligence, he endeavoured to break down the court of chancery, as well as the admiralty. It would have been fortunate for the maritime world, if his labours in the latter case had been as unsuccessful, as in the former. There are many persons, who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord Coke. To quiet the apprehensions of such persons, it may not be unfit

[1] The words of this commission are—"Dantes ei plenam, tenore patentium, potestatem audiendi querelas omnium et singulorum de hiis, quæ officium admiralli tangunt, et cognoscendi in causis maritimis, et justitiam faciendi, et excessus corrigendi, et delinguentes juxta eorum demerita castigandi, puniendi, incar cerandi, et incarceratos, qui deliberandi fuerint, deliberandi, et omnia alia, quæ ad officium admiralli pertinent, faciendi, &c. &c. Exton, 3, 294.

[2] Hawkeridge's Case, 12 Co. 129.

[3] 4 Inst. 134.

to declare, in the language of Mr. Justice Buller, that "with respect to what is said relative to the admiralty jurisdiction in 4 Inst. 135, that part of
*408 Lord Coke's work has been always received with great * caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."[1] . . .

*418 * These are all the cases adduced by Lord Coke down to the 13 Rich. 2, to disprove the jurisdiction, which has been asserted in favour of the admiralty. Unless I am very much mistaken, they entirely fail of their intended purpose; and leave the current of ancient authority flowing with an uniform and irresistible force in its favour.

Such then being the ancient or original jurisdiction of the admiralty, it will be in the next place proper to consider, in what respects it has been altered by statutes and decisions made since the period, of which we have been speaking.

The stat. 13 Rich. 2, ch. 5, enacts, "that the admirals and their deputies shall not meddle henceforth of any thing done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward [3] grandfather of our Lord and King, that now is."[2]

*419 * The stat. 15 Rich. 2, ch. 3, enacts "that of all manner of contracts, please and quereles[3] [complaints or controversies] and of all other things done or arising[4] within the bodies of counties, as well by land as by water; and also of wreck of the sea, the admiral's court shall have no manner of cognizance, power nor jurisdiction; but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral, nor his lieutenant, in any wise. Nevertheless of the death of a man, and of a maihem done in great ships, being hovering in the main stream of great rivers, only, beneath the bridges[5] of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also to arrest ships in the great flotes for the great voyages of the king and of the realm; saving always to the king all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities and boroughs, their liberties and franchises."

The stat. 2 Hen. 4, ch. 11, provides, that the statute, 13 Rich. 2, be firmly holden and kept, and put in due execution; and that, as touching a pain to be set upon the admiral or his lieutenant, that the statute and the common law be holden against them; and that he, that feeleth himself grieved against the form of the said statute, shall have his action grounded upon the case against him that doth so pursue in the admiral's court, and recover his double damages against the pursuant, and the same pursuant shall incur the pain of *l.*10 to the King for the pursuit so made, if he be attainted.

*420 * It was upon these statutes, that the controversies respecting the

[1] Smart vs. Wolff, 3 T. R. 348.

[2] "Que les admiralz et leur deputees ne soi mellent desorenavant de nulle chose fait deinz le Roialme, mais soulement de chose fait sur le meer selonc ceo q'ad este duement use el temps du noble Roy Edwards aiel nostre seigneur le roy q'or est."

[3] "Coneractes, plees et quereles."

[4] "Faitz ou sourdantz." Exton omits "ou."

[5] "Pountz."

admiralty were so zealously and obstinately maintained during more than two centuries. It is not my intention to examine how far the statutes themselves or the preambles thereof, or the petitions, on which they were founded, have been fairly published from the records of the Tower.[1] It will be sufficient for my purpose to shew, what have been the constructions respectively urged by the advocates and the opponents of the admiralty, and to consider how far the respective opinions are reconcileable with themselves or with sound principles.

In the construction of these statutes, the admiralty has uniformly and without hesitation maintained, that they never were intended to abridge or restrain the rightful jurisdiction of that court; that they meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs; and upon torts or injuries which, though arising in ports, were not done with the ebb and flow of the tide; and that the language of those statutes, as well as the manifest objects thereof as stated in the preambles, and in the petitions, on which they were founded, is fully satisfied by this exposition. So that consistently with these statutes, the admiralty may still exercise jurisdiction 1. Over torts and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2. Over all maritime contracts arising at home or abroad; 3. Over matters of prize and its incidents.

On the other hand, the courts of common law have held, that the jurisdiction of the admiralty is confined to contracts and things exclusively made and *421 done upon the high * seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are, in some measure, to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for payment of money; nor of any contracts, though maritime and made at sea, which are under seal or contain unusual stipulations; and to complete the catalogue of disabilities, it has been strenuously held by Lord Coke, that the admiralty is not a court of record, and of course has no power to impose a fine, and that it cannot take a cognizance or stipulation in aid of its general jurisdiction.[2] So that, upon the common law construction of these statutes, the admiralty, as to contracts, is left with the idle and vain authority to enforce contracts, which are made upon the high seas to be executed upon the high seas. We shall have occasion hereafter to notice some extraordinary exceptions to these doctrines.

Happily for the admiralty, it has been able to regain the right to fine and punish for contempts,[3] and to make and enforce stipulations.[4] But let it not be imagined, that the limited powers at present permitted to be exercised by the

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[1] Those who have curiosity to indulge in such speculations may receive a great deal of information from the learned labours of Doctor Exton. See Exton ch. 2, p. 288, Id. ch. 5, p. 314, Id. ch. 6, p. 331.

[2] Tomlinson's Case 12 Co. 104.—4 Inst. 134.—Empringham's Case 12 Co. 34, and cases cited in Creamer vs. Tookley. Godb. 385, 387.

[3] 12 Co. 52.—1 Vent. 1.—Styles 17.

[4] Hook vs. Shoreton 1. Id. Ray. 397.—S. P. 2 In. Ray. 632.—Greenway vs. Barker, Godb. 261.

admiralty have been obtained without a struggle. From a historical review of the cases in the books, it will abundantly appear, that it has been constantly in danger of losing its most useful jurisdiction. On the other hand, the
*422 courts of * common law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty.—And even as to matters of prize, its exclusive authority was not finally admitted and confirmed until the great case of Lindo vs. Rodney,[1] almost within our own times. It is curious indeed to observe the progress of the pretensions of the courts of common law in amplifying their jurisdiction. At first they disclaimed all cognizance of things done without the bodies of the counties of the realm; and even over collateral matters done out of the realm, which came incidentally in question upon issues regularly before the courts.[2] They afterwards held cognizance of contracts originating within the realm, to be executed abroad; of contracts made abroad, to be executed within the realm; and finally, after much hesitation and doubt, by the use of a fiction, often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation.[3] Upon what principles of the ancient common law this extension of jurisdiction can be supported, it is difficult to perceive. It has, however, been established by the usage and decisions of ages; and now rests upon the same basis and no other, that sustains the immemorial claims of the admiralty.
*423 * It will be necessary, in the subsequent examination of the doctrines which the common lawyers have asserted to support their construction of the statutes of Richard 2, to class the cases, in order more effectually to investigate the principles upon which they are founded. Before, however, we proceed to that examination, it may be well to dispose of some of the cases cited by Lord Coke,[4] which cannot properly be reviewed in any other manner. . . .
*425 * Let us now pass to the consideration of the reasons alleged, in the construction of the statutes of Richard 2, to exclude the jurisdiction of the admiralty in ports and havens, within the ebb and flow of the tide. As far as these reasons can be gathered from the imperfect light of reports, and from the laborious commentaries of Lord Coke, they resolve themselves into the following propositions. 1. That the body of every county includes all navigable salt waters, "where one may see what is done on the one part of the water and on the other, as to see from one land to the other." 2. That the sea is, ex vi termini, without the body of any county. 3. That all ports and havens are within the bodies of counties. 4. That where the common law hath jurisdiction it excludes the admiralty, and the common law hath jurisdiction in ports and havens. . . .
*435 * It may be well, in this connexion, to take notice of another doctrine of the common law, viz. that where an act is done partly upon the land

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[1] Lindo vs. Rodney, Doug. R. 613. n.

[2] Mayn. Year Book, 613. 18 Edw. 2.—Litt. lib. 3, s. 440. 21 Edw. 436.—Doctor and Stud. B. 2, ch. 2.—Fortescue, ch. 32 p. 38.—Seld. de Dom. Maris, ch. 24, p. 209, and the cases cited in Creamer vs. Tookley, Godb. 385, 387.

[3] See 1 Rich. 3, 4, pl. 7.—32 H. 6, 25, b.—39 H. 6, 39.—11 H. 7, 6.—F. N. B. 114.—Dowdale's Case, 6 Co. 46.—Co. Litt. 261, b.—4 Inst. 141, 142.—Constable's Case, 5 Co. 106.—12 Co. 79.—2 Inst. 51.—2 Brownl. 16. Tucker vs. Capp, 2 Roll. R. 497.—Spanish Ambass. vs. Jolliff, Hob. 78.—Zouch. 101, 125.

[4] 4 Inst. 137, &c.

and partly upon the sea, the admiralty is excluded. Hence it is said, that if a ship be taken at sea, and carried to a port within the body of a county, the admiralty loses its jurisdiction.[1] It is difficult to comprehend what an act is, that can be done partly on the sea and partly on the land; and still more difficult to perceive, how the bringing the property infra praesidia, (if I may so say) can deprive the admiralty of its jurisdiction. The corpus delicti still remains, and, until the property is so brought within the power of the Court, it would seem impracticable to exercise any jurisdiction at all; and it would be strange, indeed, if the only circumstance, which would render the jurisdiction effectual, should take it away. The statute 13 Rich. 2, ch. 5, allows the admiralty cognizance of things done upon the sea, and yet, upon this construction, it would be entirely lost or useless. It is utterly impossible to support such an opinion; and, accordingly, it has been in other cases qualified or abandoned.[2] Other distinctions, however, have sprung up in its room, to defeat the claims of the admiralty. It has been held, that if the tort be done at sea, and afterwards the property be changed by a sale on land; or, if the tort be not one continuing act, but be severed by the intervention of new parties, the jurisdiction of the admiralty is gone.[3]

These distinctions have, in their turn, been denied, and, after a very
*436 severe * and doubtful conflict, the reasonable doctrine seems now established, that, where the tort is done at sea, the jurisdiction of the admiralty is not defeated by any subsequent transaction on land, or by any concurrent jurisdiction of the common law.[4] And, it may be added, that this is the unquestionable doctrine in the United States.[5]

We have now considered the principal, if not all the reasons, which the courts of common law have advanced, to exclude the admiralty from jurisdiction in ports and havens.

On the other hand, the admiralty has strenuously contended, that the statutes of Richard II. never intended to deny the jurisdiction in ports and havens, within the ebb and flow of the tide, and in great streams beneath the first bridges. It fortifies its pretensions by the considerations, that such was its undoubted jurisdiction in the reign of Edward III., to which the statute of 13 Rich. 2, ch. 5, appeals for a determination of its authority; that this is the only statute, speaking affirmatively in respect to the admiralty jurisdiction, declaring it to extend to things done upon the sea; and that the sea (which includes all waters as far as the tide flows) never was within the body of any county; that long after the statutes of Richard II., the admiralty continued to exercise jurisdiction in ports and havens;[6] that it was recognized by the courts of common law upon writs of procedendo and consultation, in the reigns of Henry VIII. and Elizabeth,[7]

by acts of parliament, and especially by statute 28 H. 8, ch. 15—32 H.
*437 * 8. ch. 14, and 1 Eliz. ch. 17;[8] that it is confirmed by the forms of the

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[1] 4 Inst. 140.—12 Co. 79.

[2] 1 Roll. Abr. 533, l. 13.

[3] Spanish Amb. vs. Jolliffe, Hob. 78.—Com. Dig. Adm. F. 5.—2 Bro. Adm. 118.

[4] 1 Vent. 308.—Radley vs. Egglesfield, 1 Vent. 173.—S. C. 2 Saund. 259.—Cro. Eliz. 685. —1 Roll. Abr. 530, l. 40.—Com. Dig. Adm. F. 5 and 6.

[5] Rose vs. Himely, 4 Cranch, 241.

[6] Exton, ch. 17, p. 255.

[7] Exton, chs. 3, 10, 11, 12, 13, 17, 18, 19, and 20, p. 80 to 276.

[8] Exton, ch. 5, p. 104—ch. 20, p. 270.—Zouch, 112.

commissions of the Lord High Admiral, which, notwithstanding the statutes of Richard, have, for ages since, continued to include jurisdiction in ports and havens, and rivers beneath the first bridges;[1] and, finally, that it seems admitted in 1632, by the concurrent opinion of all the twelve judges.[2] These pretensions, too, have been deliberately adopted by Sir H. Spelman; for he says,[3] "the place absolutely subject to the jurisdiction of the admiralty is the sea, which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the shore or banks adjoining, from all the first bridges seaward." Lord Hale seems to admit the same doctrine;[4] and it has been solemnly recognized and enforced (as we shall hereafter see) by the Congress and the Supreme Court of the United States.[5]

We are next led to the consideration of the jurisdiction of the admiralty over contracts. And here it is held by the courts of common law, that the jurisdiction is confined to contracts made upon the high sea, to be executed upon the high sea, of matters in their own nature maritime.

*438 * These restrictions purport to be founded upon the construction of the statutes of Richard II., and more especially on that of 15 Richard II. ch. 3. There is, as we have already seen, no authority for them in any anteriour reign; and it is certain, that before Richard's time the admiralty did openly assert and exercise jurisdiction over maritime contracts. The statute of 13 Rich. II., ch. 5, is the only one, which (as has been already stated) speaks in affirmance of the admiralty jurisdiction, and it allows it of "things done upon the sea." It is difficult, looking to the obvious intent of this statute, as explained in the preamble, and more fully in the petition, to which it was a response;[6] to believe, that it meant to abridge the jurisdiction then claimed by the admiralty, except as to things on land within the ports of the realm. It meant to check its usurpations, and not to narrow its ancient rightful authority. And as to cases without the mischiefs of the statute, as contracts beyond seas, on which the common law would then afford no remedy, and disclaimed jurisdiction, there was no reason to extend the meaning of the enacting clause, so as to embrace them. And such for some time was the construction adopted in practice.[7] The words, however, are not "things done upon the sea" absolutely, but according to the usage in the time of Edward the third. And we have seen that, at that time, the sea comprehended the waters in ports, as far as the flood tide extended; and that maritime contracts were enforced in the admiralty. The true interpretation then of the words "things done upon the sea," in this connexion, would seem to be all things done touching the sea, i. e. maritime affairs in general; and this is

[1] Zouch, 92.

[2] "Likewise, the admiral may inquire of, and redress all annoyances and obstructions, in all navigable rivers beneath the first bridges, that are impediments to navigation, or passage to or from the sea, and, also, to try personal contracts and injuries there, which concern navigation on the sea."—Exton, 404—Zouch, 122—Agreement in 1632.

[3] Spelman Reliq. Adm. Jurisd. 226.

[4] 2 Hale, P. C. 16.—Hale De Port. ch. 7, p. 88.

[5] In Godfrey's case (Latch 11) the opinion of Doddridge, J. seems to assert, that the sea extends to tide waters in ports, for, when he speaks of a contract made on board of a ship at anchor, and says it is then made on the sea, he probably means at anchor in port.

[6] Exton, 289, 290, &c.

[7] Tucker vs. Cappe, 2 Roll. R. 497.

*439 the approved interpretation asserted by the admiralty.[1] * Nor let it be deemed a strained or unnatural construction of the words. It is adopted by Selden in respect to similar expressions in an ordinance respecting the jurisdiction of the admiralty of France. The ordinance uses this phrase, "pour raison ou occasion de faict de la mer,"[2] "id est, (says Selden,) ob causam aliquam a re maritimâ ortam."[3] Valin too recites several ordinances of France respecting the jurisdiction of the admiralty, and particularly one about this very period, (Ordin. of 1400,) which gives (art. 3,) "connoissance et jurisdiction de tous les faits de la mer, et des dependences criminellement et civilement;" and again (art. 20,) "de choses dependants de la mer," which expressions he does not scruple to declare as a grant of jurisdiction over all maritime contracts. He adds, that the judges of the admiralty have always of right, from the very nature and object of their institution, possessed cognizance of them; and this, not only as to contracts then in use, but as to all other contracts of a maritime nature.[4] Valin, therefore, affords a distinct authority in favour of this exposition of the words of the statute, for there is no substantial distinction between "choses faits sur la mer" and "faits de la mer;" and this too in a similar controversy as to jurisdiction between the rival courts of France, contested with as much zeal, as it has been in England.

But if we waive this interpretation, which rests on the reference to the usage in the time of Edward III., and if we reject this reference altogether, (which in common reason we are not at liberty to do) still, in the most literal and *440 * rigid sense of the terms, "things done upon the sea," the admiralty must have jurisdiction in all cases of maritime service and labour, for these are strictly done upon the sea. And whether the contract or engagement be made at land or not is immaterial, since the service is actually performed upon the sea, and the jurisdiction attaching to the service, the other things are but incidents. We shall presently see, how far the common law courts have adopted this or any other consistent construction of the statute.

Let us now recur to that, which should principally engage our attention, viz. the stat. of 15 Rich. II., ch. 3. It prohibits the admiralty from taking cognizance of "all manner of contracts, pleas and quereles, and all other things, done or arising within the bodies of counties, as well by land as by water." The whole question, as to the extent of this prohibition, turns upon the legal meaning of the words "contracts, pleas and quereles arising within the bodies of counties," for no particular stress can be laid upon the word "done," as in every fair construction it must refer to its next antecedent, "other things." In respect to "quereles," if by this word be meant torts or injuries in rem, or in personam, the jurisdiction would seem limited to the place where the act is done, for there it may be said properly to arise. If "complaints or controversies" be meant, (as would seem to be the critical sense) the place where they arise must depend upon the subject matter; if torts or injuries in rem, they arise, where the acts are done; if contracts or personal rights, they arise where the performance or breach

[1] Zouch, 103.—Exton, 321.

[2] The words of the statute of Rich. II. are "choses faits sur la mer."

[3] Seld. de Dom. Mar. lib. 2, cap. 18, p. 169.

[4] 1 Valin, Comm. 124.

of performance, or other invasion of right, takes place. The same observation applies to "pleas" or actions, for ex facto jus oritur, et actio oritur ex delicto. In a more enlarged sense, "controversies, pleas and actions" arise, where the law has appointed the forum competent to try them. Such are the forum
*441 rei * sitæ, the forum domicilii, the forum maleficii, &c. which depend upon the municipal regulations of each particular country.[1] In respect to "contracts," these may be said to arise, where they originate or are made, or, with equal propriety, where they are to be executed or performed. So it is laid down in the civil law, "contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit;"[2] "contracium autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia."[3] Huberus[4] asserts the same doctrine; "non eum esse locum contractus semper, ubi negotium inter partes celebratum, sed ad quem contrahentes respexerunt." The common law has adopted the same doctrine, for it construes a contract by the law of the place, where it is to be performed or executed, and not simply the place of its origin. And it now sustains actions in its own courts upon foreign contracts, solely upon the ground, that such contracts are not local, but exist or arise in every place, where the debtor is found. It proceeds yet farther, and takes cognizance of torts and injuries to persons and property without the realm, both upon the high seas and in foreign countries, upon the ground that they are not local, but arise wherever the party resides. And in this respect it seems to have adopted the doctrines of the civilians.[5]

It is utterly impossible to reconcile the decisions of the courts of common law with the construction of the stat. of 15 Rich. II., ch. 3, here stated,
*442 or indeed with any other * construction warranted by the words of the statute or by consistent principles of interpretation. . . .

*462 * We have now finished our review of the doctrines, which the courts of common law have held in the interpretation of the statutes of Richard II. It has been shewn, that the decisions are not reconcileable with each
*463 other, or with the * words of the statute, or with any sound and uniform principle of construction. There seems indeed some foundation for the declaration of Lord Holt,[6] that "heretofore the common law was too severe against the admiralty;" and for the severe censure of the learned Dr. Browne, that these decisions were founded "more in prejudice than in reason;"[7] that they were "not founded in any system, nor fraught with any consistency"; and that they "involved the subject in endless perplexity."[8]

*466 * On the whole, the result of this examination may be summed up in
*467 the following propositions. 1. That the jurisdiction * of the admiralty, until the statutes of Richard 2, extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries, and offences, on the high

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[1] See Pothier's Pandects, lib. 5, tit. 1, s. 35, &c.

[2] Dig. lib. 44, tit. 7, l. 21.—2 Emer. 331.

[3] Dig. lib. 42, tit. 5, l. 3.—Exton, 323.—Hein. Element, Pandect. pars. 2, s. 36.

[4] De foro compet, s. 53.

[5] Hub. de foro compet. s. 57, p. 731.

[6] Hoop vs. Moreton, 1 Id. Raym. 397.

[7] Bro. Adm. 85.

[8] Bro. Adm. 100.

seas, and in ports and havens, as far as the ebb and flow of the tide. 2. That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea. 3. That this interpretation is indefensible upon principle, and the decisions founded upon it are inconsistent and contradictory. 4. That the interpretation of the same statutes by the admiralty does not abridge any of its ancient jurisdiction, but leaves to it cognizance of all maritime contracts, and all torts, injuries and offences, upon the high sea, and in ports as far as the tide ebbs and flows. 5. That this is the true limit, which upon principle would seem to belong to the admiralty; that it is consistent with the language and intent of the statutes; and is supported by analogous reasoning, and public convenience, and a very considerable weight of authority. 6. That under all the circumstances, the courts of law and of admiralty in England are not so tied down by a uniformity of decisions, that they are not at liberty to entertain the questions anew, and to settle the doctrines upon their true principles; and that this opinion is supported by some of the best elementary writers in that kingdom.

But whatever may in England be the binding authority of the common law decisions upon this subject, in the United States we are at liberty to reexamine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles. The constitution has delegated to the judicial power of the United States cognizance "of all cases of admiralty and maritime jurisdiction;" and the act of Congress[1] has given to the District Court "cogni-
*468 zance of all civil causes of admiralty and maritime * jurisdiction, including all seizures under laws of impost, navigation or trade, of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen; within their respective districts, as well as upon the high seas."

What is the true interpretation of the clause "all cases of admiralty and maritime jurisdiction"? If we examine the etymology, or received use, of the words "admiralty" and "maritime jurisdiction," we shall find, that they include jurisdiction of all things done upon and relating to the sea, or, in other words, all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.[2] In all the great maritime nations of Europe, the terms "admiralty jurisdiction" are uniformly applied to the courts exercising jurisdiction over maritime contracts and concerns. We shall find the terms just as familiarly known among the jurists of Scotland, France, Holland and Spain, as of England, and applied to their own courts, possessing substantially the same jurisdiction, as the English admiralty in the reign of Edward the
*469 third.[3] * If we pass from the etymology and use of these terms (i. e.

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[1] 24 Sept. 1789, ch. 20, s. 9.

[2] Conwell, Interpreter, voce Admiral.—Spelman's Glossary, voce Admiral, sub finem.—Godolph. Jurisd. ch. 1.—1 Valin, Comm. 1.—Seld. de dom. Mar. lib. 2 cap. 16, p. 160.—Stypman, Jus. Marit. par. 1, cap. 6, p. 76, 77, par. 5, cap. 1, p. 602.—Loccenius, Jus. Marit. lib. 2 cap. 2.

[3] Cleirac. Jurisd. de la Marine, p. 191, &c.—Valin, Comm. 1, 112, 120, 127, &c.—Zouch, 87, 91.—Exton, 45, 46, 49.—Collection of Sea Laws in Malyne, lex. Merc. 47.—2 Bro. Adm. 30. The coincidence between the general authorities delegated in the admiral's commission in Scotland, and still exercised there, and those in the commission of the admiral in England, is so striking as distinctly to shew a common origin. The admiralty in Scotland has cogni-

"admiralty jurisdiction") in foreign countries, the only expositions of them, that seem to present themselves, are, that they refer 1. to the jurisdiction of the admiralty as acknowledged in England at the American Revolution; or 2. at the emigration of our ancestors; or 3. as acknowledged and exercised in the United States at the American Revolution; or 4. to the ancient and original jurisdiction, inherent in the admiralty of England by virtue of its general organization.

As to the first exposition, it is difficult to perceive upon what ground it can be reasonably maintained, for it would enlarge and limit the jurisdiction by the provisions of statutes, which have been enacted for the government and regulation of the high court of admiralty, and which proprio vigore do not extend to the colonies. It would farther involve qualifications of the jurisdiction, which are perfectly arbitrary in themselves, inapplicable to our situation, and contradictory to the commissions and practice of the vice admiralty colonial courts. Even if this exposition were to be adopted, are we to be governed by the doctrines of the common law, or of the admiralty? I am not aware of any superiour sanctity in the decisions at common law upon the subject of the jurisdiction of other courts, (to which at least they bore no good will) which should entitle them to outweigh the very able and learned decisions of the great civilians of the admiralty. And where could we so properly search for information on this subject, as in the works of those jurists, who have adorned the maritime courts from age to age, and made its jurisdiction the pride and study of their lives?

The second exposition is liable to the same objections; for it is clear, that the statutes of Richard do not extend in terms to the colonies, and it is
*470 quite certain, that they were * not included in any supposed mischiefs, for they then had no existence. Besides, it is a very material consideration, that, at the emigration of our ancestors, the contest between the courts of common law and the admiralty was at its height; and very soon after (in 1632) it was, by the agreement of the twelve judges, decided in favour of the admiralty. And here again it may be asked, whose doctrines are to be adopted, those of the common law or of the admiralty?

The third exposition requires an examination of the authority and powers of the vice admiralty courts in the United States under the colonial government. In some of the states, and probably in all, the crown established, or reserved to itself the right to establish, admiralty courts;[1] and the nature and the extent of their jurisdictions depended upon the commission of the crown, and upon acts of Parliament conferring additional authorities. The commissions of the crown gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the

zance of "all complaints, contracts, offences, pleas, exchanges, assecurations, debts, counts, charter parties, covenants, and all other writings concerning lading and unlading of ships, freights, hires, money lent upon casualties and hazard at sea, and all other businesses whatsoever among sea farers done at sea, this side sea, or beyond sea; the cognition of writs of appeal from other judges, and the causes and actions of reprisal and letters of mark; and, to take stipulations, cognoscions and insinuations in the books of the admiralty."—Collect. Sea Laws, ch. 2 Malyne, 47.—See also 1 Black. Comm. 94, 95.—Post Note p. 75.

[1] In the charter of Massachusetts, in 1692, there is an express reservation of the exclusive right in the crown to establish admiralty courts, by virtue of commissions issued for this purpose. See also Colon. Acts 1668, 1672. Mass. Col. and Prov. Laws, edit. 1814, p. 716.

*471 high seas.[1] And acts of parliament enlarged or rather recognised, * this jurisdiction by giving or confirming cognizance of all seizures for contraventions of the revenue laws.[2] Tested therefore by this exposition, the admiralty jurisdiction of the United States would be as large, as its most strenuous advocates ever contended for.

The clause however of the constitution not only confers admiralty jurisdiction, but the word "maritime" is superadded, seemingly ex industria, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "causæ civiles et maritimæ." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument.[3] One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word "maritime" would be mo[e]re tautology; but in this sense it has a peculiar and appropriate force. And Mr. Justice Winchester (speaking with reference to contracts) has very correctly observed, that *472 "neither the judicial act nor the constitution, which it * follows, limit the admiralty jurisdiction of the District Court in any respect to place. It is bounded only by the nature of the cause, over which it is to decide."[4]

The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction in short, which collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del

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[1] It is presumed that the commissions were usually in the same form. One of the latest is to the governor of the royal province of New Hampshire in 6 Geo. 3. It authorizes him "to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, enquiries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice admiralty of our said province, &c. or between any other persons whomsoever had, made, begun or contracted, for any matter, thing, cause or business whatsoever done, or to be done, within our maritime jurisdiction aforesaid, &c. &c.; and moreover in all and singular complaints, contracts, agreements, causes and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers.—And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province," &c. In point of fact the vice admiralty court of Massachusetts, before the revolution, exercised a jurisdiction far more extensive, than that of the admiralty in England. See also the Little Joe. Stewart's R. 394.

[2] The fabius, 2 Rob. 245.

[3] Montgomery vs. Henry, 1 Dall. 149. Talbot vs. —— 1 Dall. 95.

[4] The Sandwich, Peters, Rep. 233, Note.

Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.[1] Of this great system of maritime law it may be truly said—"non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una le, et sempiterna et immortalis, continebit."[2]

At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle.

The advantages resulting to the commerce and navigation of the
*473 United * States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction. And most cordially do I subscribe to the opinion of the learned Mr. Justice Winchester, in the case already cited,[3] "that the statutes of Richard 2 have received in England a construction, which must at all times prohibit their extension to this country," and "that no principles can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes or the works of jurists, who have written on the general subject." Indeed, the doctrine that would extend the statutes of Richard to the present judicial power of the United States seems little short of an absurdity. It is incorporating into the text of the constitution an exception, not only unauthorized by its terms, but wholly inappropriate in phraseology to any other realm than England. We have not as yet any "admirals or their deputies;" we do not refer their jurisdiction to the reign of "the most noble king Edward the third;" much less would an American citizen dream, that the constitution authorized the admiralty "to arrest ships in the great flotes for the great voyages of the king and of the realm;" and "to have jurisdiction upon the said flotes during the said voyages only," and "saving always to the king all manner of forfeitures and profits thereof coming," and "to the lords, cities and boroughs their liberties and franchises."

There are moreover decisions of the courts of the United States,
*474 which completely establish the proposition, that * the statutes of Richard, and the common law construction of them do not attach to this clause of the constitution. We have already seen, that the courts of common law, after these statutes, held, that the admiralty had no jurisdiction of things done within the ebb and flow of the tide, in ports, creeks, and havens. It has, notwithstanding, been repeatedly and solemnly held by the Supreme Court, that all seizures under laws of impost, navigation and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well within ports and districts of the United States, as upon the high seas, are causes of admiralty and maritime juris-

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[1] Zouch. ch. 1, p. 87, &c.—Selden ad Fletam, cap. 8, s. 5.—Rob. Collect. Marit. 105. Note. —Le Guidon, ch. 3.—1 Emer. 21.

[2] Cic. Frag. de Repub. lib. 3. (Editio. Bost. 1817, tom. 17, p. 186.

[3] The Sandwich, Peters's R. 233. Note.

diction.[1] This limitation, as to the place of seizure, is prescribed by an act of Congress;[2] but it is perfectly clear, that Congress have no authority to include cases within the admiralty jurisdiction, which the terms of the constitution did not warrant. And the ground is made stronger by the consideration, that the right of trial by jury is preserved by the constitution in all suits at common law, where the value in controversy exceeds twenty dollars; and by the statute, this right is excluded in all cases of admiralty and maritime jurisdiction.

It is therefore utterly impossible to reconcile these decisions, which in my humble judgment are founded in the most accurate and just conceptions of the admiralty jurisdiction, with the narrow and perplexed doctrines of the common law. The argument then, that attempts to engraft them upon the constitution, is wholly untenable.

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the United States comprehends all maritime
*475 contracts, * torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea.

The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance.[3] And in point of fact the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance, as maritime contracts; and a similar claim has been uniformly asserted on the part of the admiralty of England.[4] There is no more reason, why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses.[5]

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[1] United States vs. La Vengeance, 3 Dall. 287.—The Same vs. The Sally, 2 Cranch, 406.—The Same vs. The Betsey and Charlotte, 4 Cranch, 443.

[2] Act. 24th Sept. 1789, ch. 20, s. 9.

[3] Cleirac, Le Guidon, ch. 1, p. 109, ch. 3, p. 124, Id. Jurisd. de la Marine, p. 191.—1 Valin, Comm. 112, 120, &c. 127, &c.—2 Emer. 319.—Godolph. 43.—Zouch, 90, 92.—Exton, 69, &c. 295, &c.—Malyne Lex Merc. 303.—Id Collection of Sea Laws, ch. 2, p. 47.—Consol. del Mare, ch. 22.—2 Bro. Adm. ch. 4, p. 71.—4 Bl. Comm. 67.—The Sandwich, Peters's R. 233, n.—Targa. Reflex, ch 1.

[4] Boucher's Consol. del Mare, 2 vol. 730.—1 Valin, Com. 120.—2 Emer. 319.—Roccus de Assec. n. 30.—2 Bro. Adm. 80.—Zouch, 92, 102.

[5] Roccus de Ass. note 80, declares "These subjects of insurance, and disputes relative to ships, are to be decided according to maritime law; and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts, &c." Targa in his reflections (ch. 1) defines maritime contracts to be those, which according to mercantile usage, respect or concern maritime negotiations and their incidents. It has been already stated that the jurisdiction of the admiralty in England and in Scotland were originally the same. And the admiralty in Scotland still continues to exercise jurisdiction over all maritime contracts, and particularly over policies of insurance, upon the footing of its ancient and inherent rights. In Dow's Reports of decisions in the House of

*476 * My judgment accordingly is, that policies of insurance are within (though not exclusively within) the admiralty and maritime jurisdiction of the United States.[1] I therefore overrule the plea to the jurisdiction, and assign the respondent to answer peremptorily upon the merits.

In making this decree, I am fully aware, that from its novelty it is likely to be put to the question with more than usual zeal; nor can I pretend to conjecture, how far a superiour tribunal may deem it fit to entertain the principles, which I have felt it my solemn duty to avow and support. Whatever may be the event of this judgment, I shall console myself with the memorable words of Lord Nottingham, in the great case of the Duke of Norfolk.[2] "I have made several decrees, since I have had the honour to sit in this place, which have been reversed in another place; and I was not ashamed to make them, nor sorry when they were reversed by others."[3]

Lords in 1813 and 1814, are no less than eight insurance causes, which were originally brought in the admiralty in Scotland, and finally decided on appeals by the House of Lords, Lords Ellenborough, Eldon, and Erskine, assisting in the decisions.—Watt vs. Morris, 1 Dow. R. 32.—Tennant vs. Henderson, 1 Dow. R. 324.—Watson vs. Clark, 1 Dow. R. 336.—Brown vs. Smith, 1 Dow. R. 349.—Sibbald vs. Hill, 2 Dow. R. 263.—Hall vs. Brown, 2 Dow. R. 367.—Smith vs. McNeil, 2 Dow. R. 538.—Smith vs. Robertson, 2 Dow. R. 474.

[1] There can be no possible question, that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it. See ante, page 422.

[2] 3 Ch. Cas. 52.

[3] The question of jurisdiction arose and was carefully discussed by Mr. Justice Wayne in the leading case of *Waring et al.* v. *Clarke* (5 Howard, 441), decided in 1847, in which it was decided, according to the headnote, that "the grant in the Constitution, extending the judicial power 'to all cases of admiralty and maritime jurisdiction,' is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union."

"Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty. Nor is a trial by jury any test of admiralty jurisdiction. The subject-matter of a contract or service gives jurisdiction in admiralty. Locality gives it in tort, or collision.

"In cases of tort, or collision, happening upon the high seas, or within the ebb and flow of the tide, as far up a river as the tide ebbs and flows, though it may be *infra corpus comitatus,* courts of admiralty of the United States have jurisdiction.

"The meaning of the clause in the ninth section of the Judiciary Act of 1789, saving to suitors, in all cases, a common law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away."

The broad and liberal spirit in which admiralty law is understood and applied in the United States, adapting it to geographic conditions and the present needs of commerce, is admirably shown by the *Genesee Chief* (12 Howard, 443, 453), decided in 1851, in which the Supreme Court held that, while admiralty jurisdiction in England should not extend beyond the ebb and the flow of the tide, as rivers beyond this point were not navigable, this rule should not be followed in the United States, where rivers were navigable many miles beyond this point, and should be extended to the Great Lakes, irrespective of the ebb and flow as understood in England. In delivering the opinion of the court, Mr. Chief Justice Taney said:

"The union is formed upon the basis of equal rights among all the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the states bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western states. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accom-

The Scotia

Supreme Court of the United States, 1871.

[14 *Wallace*, 170.]

*171 *5. The rules of navigation established in the British orders in council, of January 9th, 1863 (prescribing the sorts of lights to be used on British vessels), and in our act of Congress of 1864 having, before the close of the year 1864, have been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, were in April, 1867, to be regarded, so far as relates to the vessels of these states, as laws of the sea. And of the historical fact that by common consent of mankind they have been acquiesced in as of general obligation, courts may take judicial notice.

6. These rules having prescribed that sailing vessels should not carry a white light, and that steamers should carry one at their masthead, a sailing vessel which carried a white light low down, so that she looked like a steamer yet at a distance, was held to be without remedy where she had collided with a steamer which mistook her for another steamer and manoeuvred accordingly. . . .

By the British Merchant Shipping Amendment Act of July 29, 1862, it was provided in Article 3 that sea-going steamships, when under way, should carry "at the foremast head, a bright white light," and in Article 6 that "sailing vessels under way . . . shall carry the same lights as steamships under way, *with the exception of the white masthead lights, which they shall never carry.*"

By Act of Congress of April 29, 1864, rules respecting sea-going vessels were adopted identical with those of the British statute, and these rules were rapidly adopted by thirty of the maritime nations of the world.

The British steamer Scotia, of the Cunard Line, upon the high seas midway on its voyage from Liverpool to New York, met, on April 8, 1867, at about midnight, the Berkshire, a sailing ship belonging to the American marine, on its voyage from New Orleans to Havre. The Berkshire carried a white light, proper in a steamship but improper in a sailing vessel under the maritime law of Great Britain and the United States and of the thirty States adopting these regu-

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plish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the states bordering on the Atlantic. . . .

"In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. . . .

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."—Editor.

lations. The Scotia believed that the Berkshire was a steamer, and a collision occurred in which the Berkshire was sunk.[1]

*180 * Mr. Justice STRONG delivered the opinion of the court. . . .

*187 * It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, what was a law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest

*188 system of maritime rules. * It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the maritime ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice.

[1] Only the facts material to the international aspects of the case have been given, and a shortened statement has been substituted for that of the official report.—Editor.

Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and such she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

Decree affirmed, with costs.

The Lottawanna.

Supreme Court of the United States, 1874.

[21 *Wallace*, 558.]

1. Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own.
2. In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.
3. The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended, and referred to, when it was declared in that instrument, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.
4. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no State law or act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.
5. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

*559 *6. It is settled, by repeated adjudications of this court, that material-men furnishing repairs and supplies to a vessel in her home port do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States.

7. Whilst it cannot be supposed that the framers of the Constitution contemplated that the maritime law should remain unchanged, the courts cannot change it; they can only declare it. If within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department.
8. *Semble*, that Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country.
9. In particular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the Constitution, and where the subject does not in its nature require the exclusive exercise of that power, the States, until Congress acts, may continue to legislate.

10. Hence, liens granted by the laws of a State in favor of material-men for furnishing necessaries to a vessel in her home port in said State are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the District Courts of the United States. . . .

APPEAL in admiralty from the Circuit Court for the District of Louisiana. The case was thus:

In the year 1819 this court, in *The General Smith*,[1] decided (as the profession has generally understood), that in respect to repairs or necessaries furnished to a ship in the port or State to which she belongs, no lien is implied unless it is recognized by the municipal law of the State; declaring the
*560 * rule herein to be different from that where the repairs or necessaries are furnished to a foreign ship; in which case it was admitted that the maritime law of the United States gives the party a lien on the ship itself for his security.

In view of this decision most or all of the States enacted laws giving a lien for the protection of material-men in such cases.

In the year 1833, in the case of *The Planter*,[2] the converse of the rule in *The General Smith* was laid down, and process against a vessel in her home port was used and supported, the State law giving a lien in the case. . . .

*571 * Mr. Justice BRADLEY delivered the opinion of the court.

The principal questions raised in this case were decided by this court adversely to the lien more than fifty years ago in the case of *The General Smith*, reported in 4 Wheaton, 438, and that occasion has ever since been adhered to, except occasionally in some of the District Courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the act for recording them in the custom-house; and the confidence with which purchasers and mortgagees have invested money therein under the existing course of decisions on this subject, have placed a large amount of property at undue hazard, if those decisions may lightly, or without grave cause, be disturbed.

The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when

[1] 4 Wheaton, 443.

[2] Reported under the name of Peyroux *v.* Howard, 7 Peters, 324.

furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

*572 * But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and

*573 justice. Hence the adoption * by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each State adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the

general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule.

*574 The difference between them in a matter that concerns only their own citizens, in each case, * cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and with proper qualifications, received with the binding force of law in all countries.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritime law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.

*575 It assumes that the meaning * of the phrase, "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and

limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of *The St. Lawrence*,[1] where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision
*576 its definite boundaries; but certainly no State law can enlarge * it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government."

Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

[1] 1 Black, 526, 527.

*577 But we must always remember that the court cannot * make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

On this subject the remarks of Mr. Justice Nelson, in delivering the opinion of the court in *White's Bank* v. *Smith*[1] (which established the validity and effect of the act respecting the recording of mortgages on vessels in the custom-house), are pertinent. He says: "Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the act of September 1st, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the act of 31st December, 1792, and must be wholly owned by a citizen or citizens of the United *578 * States, and to be commanded by a citizen of the same." . . .

"Congress having created, as it were, this species of property, and conferred upon its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction." This case was subsequently affirmed by *Aldrich* v. *Aetna Company*.[2]

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.[3]

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[1] 7 Wallace, 655, 656.

[2] 8 Wallace, 491.

[3] The balance of the case is omitted, to the effect that, on the evidence, the lien for supplies had not been perfected under the State law; that if it had been, the libels for such

Respublica v. De Longchamps.

Court of Oyer and Terminer at Philadelphia, 1784.

[1 *Dallas,* 111.]

A secretary of legation is entitled to all the immunities of a minister.
The law of nations forms part of the municipal law of Pennsylvania.
Punishments must be certain and definite. One who has assaulted a foreign minister cannot be sentenced to imprisonment, until the foreign sovereign shall declare the reparation satisfactory.

CHARLES JULIAN DE LONGCHAMPS, commonly called the *Chevalier De Longchamps,* was indicted, that "he on the 17th of *May,* 1784, in the dwelling-house of his Excellency the French Minister Plenipotentiary, in the presence of *Francis Barbe Marbois,* unlawfully and insolently did threaten and menace bodily harm and violence to the person of the said *Francis Barbe Marbois,* he being Consul General of *France* to the *United States,* Consul for the State of *Pennsylvania,* Secretary of the French Legation &c. resident in the house aforesaid, and under the protection of the law of nations and this Commonwealth." And that "afterwards, to wit on the 19th of *May* in the public street &c. he the said *Charles Julian de Longchamps* unlawfully, premeditatedly and violently, in and upon the person of the said *Francis Barbe Marbois* under the protection of the laws of nations, and in the peace of this Commonwealth, then and there being, an assault did make, and him the said *Francis Barbe Marbois* unlawfully and violently did strike and otherwise &c. in violation of the laws of nations, against the peace and dignity of the *United States* and of the Commonwealth of *Pennsylvania.*"—To these charges the defendant pleaded *not guilty.*

The evidence, in support of the first Count, was, that on the 17th of *May, De Longchamps* went to the house of the Minister of *France,* and after some conversation with *Monsieur Marbois,* was heard to exclaim in a loud and men-

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supplies could not be sustained prior to a recent change in the admiralty rules promulgated by the Supreme Court. The dissenting opinion of Mr. Justice Clifford is also omitted.

In *The Scotland* (105 U. S. 24, 29), decided in 1881, Mr. Justice Bradley, speaking for a unanimous court, said:

"But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawana* (21 Wall. 558), the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted and administered as such."

In *The Manhasset* (18 Fed. Rep. 918, 922), decided in 1884, Judge Hughes of the Circuit Court of Virginia thus summarized the law on this phase of the subject:

"From all that has been said, these things would seem to be clear: *First,* that maritime law, existing as it does by the common consent of nations, and being a general law, cannot be changed or modified as to its general operation by any particular sovereignty; *second,* that it has force in any country only by its adoption, express or implied, by that country, and may be modified in its special operation in that jurisdiction at the will of the special sovereignty; *third,* that it is by such adoption part of the Federal law of the United States, and incapable of modification by state enactment,—Congress having exclusive power, under the constitution, 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;' and the judicial power of the United States, 'exclusive of the State courts,' extending 'to all cases of admiralty and maritime jurisdiction.'"—Editor.

acing tone, *Je vous deshonnerera, Poliçon, Coquin,"* addressing himself to that gentleman. That the noise being heard by the Minister, he repaired to the room from which it issued, and that in his presence the defendant repeated the insult offered to *Monsieur Marbois* in nearly the same terms.

In support of the second Count, it appeared, that *De Longchamps* and *Monsieur Marbois,* having met in *Market Street,* near the Coffee House, entered into a long conversation, in the course of which, the latter said that he would complain to the civil authority, and the former replied, "you are a Blackguard."

The witnesses generally deposed that *De Longchamps* struck the cane
*112 of *Monsieur Marbois,* * before that gentleman used any violent gestures, or even appeared incensed; but that as soon as the stroke was given, *Monsieur Marbois* employed his stick with great severity, till the spectators interfered and separated the parties. One of the witnesses, indeed, said, that previously to engaging with their canes, he observed the two gentlemen, at the same instant, lay their hands on each others shoulders, in a manner so gentle, that he, who had heard it was customary among the *French* to part with mutual salutations, imagined a ceremony of that kind was about to take place, and was surprised to see *De Longchamps* step back, and strike the cane of *Monsieur Marbois.*

On the part of the defendant, evidence was produced of his having served with honour in the *French* armies, and his commission of Sub-Brigadier in the dragoons of *Noailles,* was read. It appeared that the occasion of his calling on *Monsieur Marbois,* was to obtain authentications of these, and some other papers relative to his family, his rank in *France,* and his military promotions, in order to refute several publications, which had been made in the newspapers, injurious to his character and pretensions. The refusal of *Monsieur Marbois* to grant the authentications required, was the ground of *De Longchamps'* resentment, and the immediate cause of his menaces at the Minister's house.

With respect to the assault, one witness (a Frenchman) swore that he saw *Monsieur Marbois* give the first blow, and his Excellency the President of the State, testified, that *Monsieur Marbois,* having complained to him of the insult received in the Minister's house, he sent a message to *De Longchamps,* requesting to see him; that the defendant readily attended, when his Excellency explained his reasons for apprehending, that he meditated some personal violence upon *Monsieur Marbois,* and requested him to pledge his parol of honour, that he would prosecute the matter no farther. This he declined in polite, but positive terms; when his Excellency proposed to *Monsieur Marbois* that the Chevalier should be bound over for his good behaviour; but that gentleman would not accede to the proposal.

Sergeant and *Vannost,* for the defendant, contended, that the expressions laid in the first part of the indictment, were too equivocal to be construed into menaces of corporal harm. "I will dishonour you," is a sentence that conveys more than one signification; and the threat would have been fully accomplished, had the Chevalier descended to any of those very libellous publications, with which his own character had been aspersed. The established maxim, that words ought to be taken in their mildest sense, operates, therefore, in favour of the defendant; and, at all events, that they do not amount to an assault, and are not the subject of an Indictment, are principles incontrovertibly established. 3 *Bl. Com.* 20. *Finch L.* 202. 4 *Inst.* 108. They insisted, that the President offered

Monsieur Marbois the only security which the law will allow on such occasions, and which would effectually have restrained any future violence intended
*113 * to be committed upon his person. That therefore his having suffered a second insult, must be imputed to his refusal to accept that security.

It is pretended, that by the menaces at the house of the Minister, the law of nations was violated, yet, it must be remembered, that the reparation sought, and the remedy offered, are confined to the municipal law of *Pennsylvania,* where the offence was committed; and, in all cases of menaces, the law of *Pennsylvania* yields no further relief, than the imposition of a legal restraint on the execution of those menaces. The degree of outrage is, likewise, to be computed by the quality of the person offended; and as the application of the defendant was to procure a certificate from the *Consul of France,* if *Monsieur Marbois* has been at all insulted, it is only in that character, which is not protected by the law of nations. *Vat. lib.* 4. §. 75. and consequently there is no redress, but what the law of the State provides.

On the second count, of the Indictment, they argued, that it was not sufficiently proved, that *De Longchamps* was the aggressor. One witness has sworn positively, that the first blow was given by *Monsieur Marbois,* and another describes the parties to have laid their hands on each other, at the same instant. Though other witnesses did not see these circumstances, yet they are grounded upon affirmative testimony, which cannot be destroyed by that which is merely negative. *Gilb. L. E.* 157. If, therefore, the evidence for the defendant was entitled to credit, it appeared, that *Monsieur Marbois* was the author of the outrage; and, it is so well established that no elevation, rank, or immunity of character, can abrogate the right of self defence, that if a Sovereign Minister offend a Citizen, the latter may oppose him, without departing from the respect due to his station, and give him a lesson that shall both efface the stain and expose the author of the outrage. *Vatt. lib.* 4. §. 80.

The *Attorney General,* assisted by *Wilson,* supported the prosecution. The necessity of sustaining the law of nations, of protecting and securing the persons and privileges of Ambassadors; the connection between the law of nations and the municipal law; and the effect which the decision of this case must have upon the honor of *Pennsylvania,* and the safety of her Citizens abroad, were stated at length from 3 *Burr.* 1480. 1 *Bl. Com.* 253. 4 *Bl. Com.* 70. *Vatt. pres.* 6. *page* 203. *Vat. lib.* 1. §. 6. *lib.* 4. §. 84. §. 80. *Ayliff's Pandect. lib.* 2. 132.

On the first part of the Indictment, they observed, that the meaning of the menace used in the Minister's house, was to be sought for in the opinion of the *French* nation. With them, the phrase extended farther than colloquial dishonor (*that Monsieur Marbois* had already suffered) it implied personal violence. This was the idea, likewise, of his Excellency, the President of the State, and the event confirms it beyond a doubt. If, therefore, the menace had been attended with its natural effect, impressing *Monsieur Marbois* with an apprehension
*114 for his own safety, the Consul General of *France,* * and the Secretary of the *French* Legation to the *United States,* must have been prevented from paying a proper attention to his appointments, which is certainly a violation of the law of nations. *Vatt. lib.* 2. §. 218. Upon the same principle that the infringement of a Statute, is an indictable offence, though the mode of punishment is not pointed out in the Act itself, an offence against the laws of Nations, while they compose a part of the law of the Land, must necessarily be indictable.

With respect to the assault, they contended, that the weight of the testimony proved *De Longchamps* to be the aggressor; and the respective characters of the parties tend to confirm it: *Monsieur Marbois* preserved during the whole

transaction, his constitutional temperament—cool, deliberate, and self-possessed: while *De Longchamps,* naturally captious and impetuous, became incensed at the imaginary injuries he had received, and, by his own declarations, was determined to be revenged.

The CHIEF JUSTICE, after minutely recapitulating the evidence, and applying it to the charges in the indictment, expressed the following sentiments.

M'KEAN, *Chief Justice.* This is a case of the first impression in the *United States.* It must be determined on the principles of the laws of nations, which form a part of the municipal law of *Pennsylvania;* and, if the offences charged in the indictment have been committed, there can be no doubt, that those laws have been violated. The words used in the Minister's house, (which is to be considered as a *Foreign Domicil,* where the Minister resides in full representation of his sovereign, and where the laws of the State do not extend) may be compared to the same words applied to the Judges, in a Court of Justice, where they sit in representation of the majesty of the People, of *Pennsylvania.* In that case, the offender would be immediately committed to jail, without the preliminary process of an indictment by a Grand Jury; and, in the case before us, if the offender is convicted, he may certainly be punished by fine and imprisonment.

In actions of Slander, words were formerly construed in the mildest sense they would admit; but reason has superceded such forced interpretations, and words are now to be taken according to their ordinary import and meaning. Those expressed by the defendant, are evidently of a tendency so opprobrious and violent, that they cannot fail to aggravate the outrage which has been committed.

As to the assault, this is, perhaps, one of that kind, in which the insult is more to be considered, than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal di[e]finition of Assault and Battery, and among gentlemen, too often induce duelling, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability; *De Longchamps'* striking *Monsieur Marbois'* cane, is a sufficient justification of that gentleman's subsequent conduct.

*115 * BRYAN, *Justice.* The distinction, between a Consul and a member of the Legation, is not warranted in this case; for, *Monsieur Marbois* never ceased to be the latter. As Secretary to the Legation, his authority descends from a high source, his commission being made out in the same form as the Minister's, and signed in the same manner, by the King his master.

The Jury, at first, found the defendant guilty of the Assault *only;* but, the Court desiring them to re-consider the matter, they returned with a verdict against him on both Counts.

The sentence of the Court was suspended, in consequence of a case stated by his Excellency, the President, and the Honorable Supreme Executive Council, for the opinion of the Judges. It was argued in open Court, on the 10th and 12th of *July,* by five Counci[se]l, two for the affirmative, and three for the negative; and on the 7th of October, the prisoner being brought before the Court, the CHIEF JUSTICE stated the case, repeated the answers of the Judges, and, finally, pronounced the judgment of the Court, in the following manner.

M'KEAN, *Chief Justice.—Charles-Julian De Longchamps:*—You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the honorable *Francis-Barbe De Marbois,* Secretary to the Legation from *France,* and Consul General of *France* to the *United States* of *America,* in the mansion-house of the Minister Plenipotentiary of *France;* and for an Assault and Battery committed upon the said Secretary and Consul, in a public street in the City of Philadelphia. To this Indictment you have pleaded, that you were not guilty, and for trial put yourself upon the country;—an unbiased Jury, upon a fair trial, and clear evidence, have found you guilty.

These offences having been thus legally ascertained and fixed upon you, his Excellency, the President, and the Honorable the Supreme Executive Council, attentive to the honor and interest of the State, were pleased to inform the Judges of this Court, as they had frequently done before, that the Minister of *France* had earnestly repeated a demand, that you, having appeared in his house in the uniform of a French Regiment, and having called yourself an officer in the troops of his Majesty, should be delivered up to him for these outrages, as a *Frenchman* to be sent to *France;* and wished us in this stage of your prosecution, to take into mature consideration, and in the most solemn manner to determine:—

1st. Whether you could be legally delivered up *by Council,* according to the claim made by the late Minister of *France?*

2dly. If you could not be thus legally delivered up, whether your offences in violation of the law of nations, being now ascertained and verified according to the laws of this Commonwealth, you ought not to be imprisoned, until his most Christian Majesty shall declare, that the reparation is satisfactory?

And 3dly. If you can be thus imprisoned, whether any legal act can be done by Council, for causing you to be so imprisoned?

*116 * To these queries we have given the following answer in writing:—

"In compliance with the request of his Excellency, the President, and the Honorable the Supreme Executive Council, we postponed passing sentence upon *Charles-Julian De Longchamps,* until we had maturely considered the three questions above proposed for our determination. On the 10th and 12th days of July the several questions were argued before the Court by five Counsel, two on the affirmative and three on the negative side. We have kept the matter under advisement until this day, and now deliver our opinion thereupon.

1. "And as to the first question, we answer, That it is our opinion, that, in *this case, Charles-Julian De Longchamps* cannot be legally delivered up by *Council,* according to the claim made by the Minister of France. Though, we think, cases may occur, where *Council* could, *pro bono publico,* and to prevent atrocious offenders evading punishment, deliver them up to the Justice of the Country to which they belong, or where the offences were committed.

2. "Punishments must be inflicted in the same County where the Criminals were tried and convicted, unless the record of the attainder be removed into the Supreme Court, which may award execution in the County where it sits; they must be such as the laws *expressly* prescribe; or where no stated or fixed judgment is directed, according to the *legal discretion* of the Court; but judgments must be *certain and definite* in all respects. Therefore, we conclude, that the

Defendant cannot be imprisoned, until his most Christian Majesty shall declare, that the reparation is satisfactory.

3. "The answer to the last question is rendered unnecessary by the above answer to the second question."

The foregoing answers having been given, it only remains for the Court to pronounce sentence upon you. This sentence must be governed by a due consideration of the enormity and dangerous tendency of the offences you have committed, of the wilfulness, deliberation, and malice, wherewith they were done, of the quality and degree of the offended and offender, the provocation given, and all other circumstances which may in any way aggravate or extenuate the guilt.

The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the *practice* of different Nations, and the *authority* of *writers*.

The *person* of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world.

*117 * All the reasons, which establish the independency and inviolability of the *person* of a Minister, apply likewise to secure the immunities of his *house*: It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade it's freedom is a crime against the State and all other nations.

The *Comites* of a Minister, or those of his *train,* partake also of his inviolability. The independency of a Minister extends to all his household; *these* are so connected with him, that they enjoy his privileges and follow his fate. The *Secretary* to the Embassy has his commission from the Sovereign himself; he is the most distinguished character in the suite of a public Minister, and is in some instances considered as a kind of public Minister himself. Is it not then an extraordinary insult to use threats of bodily harm to his person in the domicil of the Minister Plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his Sovereign cannot be transacted, and his dignity and grandeur will be tarnished.

You then have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of this law (gentlemen of amiable characters, and highly esteemed by the government of this State) in a most wanton and unprovoked manner: And it is now the interest as well as duty of the government to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of *Lord Chief Justice Holt* and the Court of King's-Bench in *England,* in the noted case of the Russian Ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar *Peter* was satisfied, without ever proceeding to *judgment;* and from this it has been inferred, that the Court doubted, whether they could inflict *any punishment* for an infraction of the law of nations.

But this was not the reason. The Court never doubted, that the law of nations formed a part of the law of *England,* and that a violation of this general law could be punished by them; but no punishment less than *death* would have been thought by the Czar an *adequate* reparation for the arrest of his Ambassador; *This* punishment they could not inflict, and *such* sentence as they could have given, *He* might have thought a fresh insult. Another expedient was therefore fallen upon. However, the Princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offence charged in the indictment, namely the Assault and Battery, needs no observations.

Upon the whole THE COURT after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:—

*118 * That you pay a fine of one hundred French Crowns to the Commonwealth; that you be imprisoned until the 4th. day of *July* 1786, which will make a little more than two years imprisonment in the whole; that you then give good security to keep the peace, and be of good behaviour to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of *Pennsylvania,* for the space of seven years, by entering into a recognizance, yourself in a thousand pounds, and two securities in five hundred pounds each: that you pay the costs of this prosecution, and remain committed until this sentence be complied with.[1]

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[1] In *Osborn* v. *Bank of the United States* (9 Wheaton, 737, 854–5), decided in 1824, Chief Justice Marshall calls attention in passing to the second section of the third article of the Constitution, which extends the judicial power "to all cases affecting ambassadors, other public ministers and consuls," and thus explains the reason for vesting the Supreme Court with the jurisdiction of cases to which diplomatic and consular agents are not technically parties but in which they are affected:

"If a suit be brought against a foreign minister, the supreme court alone has original jurisdiction, and this is shown on the record. But suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognisance of all cases 'affecting' foreign ministers; and therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties."

For the sense in which the statement of the Chief Justice is to be understood and applied in the matter of States and their interests, see his later opinions in the cases of *Governor of Georgia* v. *Madrazo* (1 Peters, 110), decided in 1828, *post* p. 495, and *Ex parte Madrazo* (7 Peters, 672), decided in 1833, *post* p. 501.—Editor.

In re Baiz, Petitioner.

Supreme Court of the United States, 1890.

[135 *United States*, 403.]

The Consul General of Guatemala and Honduras in New York, being a citizen of and resident in the United States, was accredited by the government of Honduras as its diplomatic representative here. The Secretary of State declined to receive him as such, on the ground that the immunities and privileges attaching to the office made it inconsistent and inconvenient that a citizen of the United States should "enjoy so anomalous a position." The Consul General then inquired whether the Department would regard him as chargé d'affaires *ad hoc* of Honduras, without relieving him of his duties and responsibilities as a citizen; to which the Department replied that it could not recognize
*404 his agency as conferring * upon him any diplomatic status. A diplomatic representative was then accredited to the United States from Guatemala, Honduras and Salvador, and was received as such. Three years later, being about to temporarily absent himself from his post, this representative requested the Secretary of State "to allow that the Consul General of Guatemala and Honduras in New York," the same person still holding that office "should communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, which should without delay be presented to the knowledge of your Excellency." The reply of the Secretary, directed to "The Consul General of Guatemala and Honduras," stated that he would "have pleasure in receiving any communication in relation to Central America of which you may be the channel as intimated;" and notes were subsequently interchanged between him and the Department, and *vice versa*, until the arrival of an accredited diplomatic representative. *Held*, that the Consul General of Guatemala and Honduras did not thereby become the diplomatic representative of Guatemala, Honduras and Salvador during the absence of the regularly accredited representative, and that, in the absence of a certificate from the Secretary of State that he was such representative, he was not entitled to the immunity from suit except in this court which is granted by the Constitution to such persons.

On an application to this court, by a person claiming a diplomatic privilege, for a writ of prohibition or a writ of mandamus, to restrain a district court from the exercise of its ordinary jurisdiction on the ground that the petitioner is a privileged person, the respondent is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege.

When a person claims in this court the rights and privileges of a foreign minister, the court has the right to accept the certificate of the Department of State that he is, or is not, such a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

The case, as stated by the court, was as follows:

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the District Court of the United States for the Southern District of New York against Jacob Baiz, to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year. The defendant entered upon a general appearance in the action, which was filed July 17, 1889. On the 25th day of September, 1889, the defendant verified his answer, which contained a plea to the jurisdiction of the District Court in the following language:

"The defendant alleges that he is now, and ever since the month of
*405 July, 1887, has been, the Consul General of the Republic * of Guatemala, at the city of New York, and that in or about the month of May, 1889, he received from the Republic of Guatemala a duly authenticated copy of a decree in the English language, dated at the National Palace in Guatemala, May 14, 1889, with instructions in writing from said government to publish the same in the newspapers of the United States, and which said decree had previously been published in the official *Gazette*, or newspaper, published in said republic, and that pursuant to such instructions, which were sent to him both by letter and by cable, and not otherwise, he did, on or about the 9th day of June, 1889, send to the managers of the Associated Press, in the city of New York, said authenticated copy of said decree, stating that it was possible that said managers would find it of sufficient interest to publish. That prior to the 16th day of January, 1889, one Señor Don Francisco Lainfiesta was envoy extraordinary and minister plenipotentiary of the Republic of Guatemala in the United States, and on or about that day he departed from the United States upon a temporary leave of absence, duly granted to him, and that from on or about that day, down to on or about the 10th day of July, 1889, this defendant became and was the acting minister and sole representative of the said Republic of Guatemala in the place, and during the absence, of the said envoy extraordinary and minister plenipotentiary, and was exclusively in charge of the diplomatic affairs of the said republic in the United States.

"And by reason of the facts herein alleged this defendant claims that this court has no jurisdiction of this action, and that if any jurisdiction for said act in fact exists in any court, it is vested solely in the Supreme Court of the United States, pursuant to the provisions of the Constitution and the statutes of the United States in such case made and provided."

In January, 1890, a motion was made "for an order setting aside the service of the summons and all subsequent proceedings in the action, and that the court dismiss the same, on the ground that it has no jurisdiction of this action, and had no jurisdiction over the defendant at the time of the commencement
*406 thereof." This motion was based on the defendant's * affidavit and upon proofs consisting of original written communications from the State Department to Baiz, and on duly-certified copies of papers on file in said department; and was resisted by the plaintiff on certain affidavits, and an original letter from the department. On the 17th day of February the motion was denied, and an application was then made to this court for a rule to show cause why a writ of prohibition should not issue to the judge of the District Court, prohibiting him from proceeding further in said action; or if a writ of prohibition could not issue, then for a rule to show cause why a writ of mandamus should not issue, commanding the judge to enter an order dismissing the cause, for the reason that the jurisdiction of said action existed solely in the Supreme Court under the Constitution and laws of the United States; or for such other and further relief as might be proper in the premises. The application was made upon the petition of the defendant in the action in the District Court, and annexed to the petition and forming a part of it was a certified copy of the entire record in the District Court, including every paper used upon the motion, and the opinion of the court. A rule having been issued, the judge of the District Court returned

thereto that the motion was denied upon the facts and considerations appearing in the record and opinion, copies of which were attached to the petition, and to the order to show cause, and submitted to this court whether the District Court should take further cognizance of the said cause or should dismiss the same. . . .

*417 * Mr. Chief Justice Fuller delivered the opinion of the court.

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers, and consuls." Const. Art. III, sec. 2.

By section 687 of the Revised Statutes, it is provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic ser-

*418 vants, as a court of law can have consistently with the law of nations; * and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul is a party." By section 563, it is provided that "the District Courts shall have jurisdiction as follows: . . . Seventeenth. Of all suits against consuls or vice-consuls," except for certain offences. The petitioner has been, since July, 1887, the consul general of the Republic of Guatemala, and therefore the District Court had jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the District Court, that at the time of the commencement of the action and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said republic [of Guatemala] in the United States," and for that reason came within the words of section 687, "other public ministers."

The exemption asserted ceased on the 10th of July, 1889, and on the 17th of July the petitioner gave a general notice of appearance in the action, but did not set up the want of jurisdiction until the 25th of the following September. Suit could have been brought in that court against him on the 11th day of July, but as in his view this could not have been done on the 29th of June or the 2d of July, he contends that the District Court should be ordered to dismiss the suit, though it could at once be recommenced therein. But it is said that the appearance did not waive the right to be sued in this court rather than in the District Court, because that was the privilege of the country or government which he represented. Without pausing to inquire how far this is a correct application of the international privilege of not being sued at all, its assertion, even in this restricted form serves to emphasize petitioner's contention that he was at that time the minister or diplomatic agent of the republics of Guatemala, Salvador and Honduras in the United States, entrusted by virtue of his office with authority to represent those republics in their negotiations and to vindicate their prerogatives.

*419 * Under section 2, Art. II, of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign

power or by a foreign power to the United States, and the words are so used in section 2 of Art. III. These agents may be called ambassadors, envoys, ministers, commissioners, chargés d'affaires, agents, or otherwise, but they possess in substance the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. 7 Opinions Attys. Gen. (Cushing), 186.

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, chargés d'affaires, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in Title XLVII, "Foreign Relations," Rev. Stat., 2d ed. 783. Section 4062 provides that "every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or
*420 domestic servant of any such minister, * is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States "in the service of a public minister," and process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed.

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, vice-consul general, consul or vice-consul."

Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute 7 Anne, c. 12, which was declaratory simply of the law of nations, which Lord Mansfield observed, in *Heathfield* v. *Chilton*, 4 Burrow, 2015, 2016, the act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liége, Lord Mansfield said: "I should desire to know in what manner this minister was accredited—

certainly, he is not an ambassador, which is the first rank—envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister' 'tis true; but minister (alone) is an equivocal term." The statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death, 1 Bl. Com.
*421 254; and it was in reference to this * that Lord Ellenborough, in *Viveash* v. *Becker,* 3 M. & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign price, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the act of Parliament, which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the act of 1790. In *United States* v. *Liddle,* 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as chargé des affaires of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation," and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States* v. *Ortega,* 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon chargé d'affaires; a letter from the minister to Mr. Salmon; a letter from the Secretary of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as chargé d'affaires; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as chargé d'affaires, and was accredited by the Secretary of State. In *United States* v. *Benner,* Baldwin, 234, the court was
*422 furnished with a certificate from the Secretary of State that the * Danish minister had by letter informed the Department that Mr. Brandis had arrived in this country in the character of attaché to the legation, and that said Brandis had accordingly, since that date, been recognized by the Department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was 'the acting minister

or chargé d'affaires of the Republics of Guatemala, Salvador and Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such, and therefore was a public minister, within the statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised chargés d'affaires, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this government the representatives of the United States have heretofore been ranked in three grades, the third being chargés d'affaires. Secretaries of legation act *ex officio* as chargés d'affaires *ad interim,* and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim,* in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc,* who are originally sent and accredited by their governments, or chargés d'affaires *per interim,* substituted in the place of the minister of their respective nations during his absence." Elements Int. Law (8th ed.), § 215.

*423 * Ch. de Martens explains that [1]"chargés d'affaires *ad hoc* on permanent mission are accredited by letters transmitted to the minister of foreign affairs. Chargés d'affaires *ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." Guide Diplomatique, Vol. 1, p. 61, § 16.

"They," observes Twiss in his Law of Nations, § 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, I Calvo, Droit Int. 586, 2d ed. Paris 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

[2]"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of

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[1] Les Chargés d'affaires *ad hoc,* en mission permanente, sont accédités par des lettres remises au ministre des affaires étrangères. Les chargés d'affaires *ad interim* sont présentés comme tels par le ministre de premiére ou 2de Classe lorsqu'il se dispose à quitter son poste temporairement ou définitivement.

[2] Il reste une dérnière supposition à prévoir: celle où un consul est chargé provisoirement de la gestion des affaires d'un poste diplomatique; il est accrédité, dans ce cas, en sa qualité diplomatique, soit par une lettre du ministre des affaires étrangères de France au ministre des affaires étrangères du pays où il doit résider, soit par une lettre de l'agent diplomatique qu'il doit remplacer, soit enfin par la présentation personelle de cet agent au ministre des affaires étrangerès du pays

the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." Guide Pratique des Consulats, Vol. 1, p. 93.

*424 * That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne,* 3, Wheat. 435, 445, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed chargé d'affaires, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as chargé d'affaires and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty. Gen. Cushing, 7 Opinions, 342, 345.

*425 * This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d ed. c. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, chargé d'affaires *ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction.

The letter of Señor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz as chargé d'affaires *ad interim,* nor equivalent to such an appointment. It was a request in terms that the Secretary of State would "please allow that the Consul General of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the Secretary of State any matters relating to the peace of Central America of which that de-

partment ought to be informed without delay. This is not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the department would be pleased to receive any communication in relation to Central America of which Consul General Baiz might be made the channel. This reply is addressed to Mr. Baiz as "Consul General of Guatemala and Honduras," and not as chargé d'affaires *ad interim.* The mere fact that the usual note conveying the information to the legations of Mr. Secretary Blaine's accession chanced to be addressed to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador and Honduras," was not a recognition that he was chargé d'affaires *ad interim,* or exercising diplomatic functions; and
*426 Mr. Baiz in acknowledging the receipt of that * announcement properly signs his letter "Consul General." It may be that such announcements are not sent to any but those exercising diplomatic functions; but this courtesy could not operate as in itself a deliberate recognition of the right to exercise such functions, nor that the person to whom the communication was addressed was in such exercise as a matter of fact. It was entirely proper, since Consul General Baiz was the channel of communication between Guatemala, Honduras and Salvador and the State Department, that the notification should be sent to him, and even if that course had not been usual, the courtesy could not be availed of to impart a character which the recipient did not otherwise possess.

The proofs show that of ten letters from the State Department to Mr. Baiz, between January 16 and July 10, 1889, two were addressed to him as in charge of the legations, or the business of the legations, of Guatemala, Salvador and Honduras; two were addressed to him as Consul of Honduras; and six as Consul General of Guatemala, or Guatemala and Honduras. Of seven letters from Mr. Baiz to the department, one was signed Jacob Baiz, and six, Jacob Baiz, Consul General. The acknowledgment of notice of the accession of the Secretary of State, and of the appointment of Mr. Mizner, and the transmission of a letter from the President of Guatemala, and the announcement of the appointment of Minister Cruz, by the Consul General, can hardly be regarded as the performance of diplomatic functions as such.

The official circular issued by the Department of State, corrected to June 13, 1889, gives the names and description of the chargés d'affaires *ad interim,* in the case of countries represented by ministers who were absent and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "Consul and acting Consul General, in charge of business of legation," and the fact of the presentation with the date appears in the list; while in the instance of Guatemala, Salvador and Honduras, the name of Mr. Baiz is referred to in a foot-note, with the title of Consul General only; nor does it appear, nor is it claimed to be the fact, that he was ever pre-
*427 sented. As stated by * counsel, Mr. Webster took the ground, in the case of M. Hülsemann, that as chargé d'affaires he was not, as matter of strict right, entitled to be presented to the President; and this is in accordance with the regulations of the State Department. Cons. Reg. 13. But such presentation is undeniably evidence of the possession of diplomatic character, and so would be the formal reception of a chargé d'affaires *ad interim* by the Secretary of State. The inference is obvious, that if the Department of State had regarded

Mr. Baiz as chargé d'affaires *ad interim,* or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of chargé, or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the Secretary of State that he had been recognized by the Department of State as charge d'affaires *ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and if the State Department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the Department would not have furnished a certificate to that effect; but instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient résumé of the facts, the letter being in effect a polite declination to give the particular certificate desired, because that could not properly be done. . . .

*429 * It is objected that we ought not to have allowed these
*430 * official papers to come before us, but should have prohibited the District Court from exercising jurisdiction, because the evidence that established it had not all been before that court when the question was raised; but the rule governing this class of cases involves no such consequences. The district judge was of opinion that inasmuch as there were two kinds of direct evidence which would show that the defendant was a "public minister," to wit: (1) A certificate of the Secretary of State that he was such, was received as such and was exercising such functions; or (2) proof of the exercise by the defendant of "the principal diplomatic functions," under some one of the titles of diplomatic office, as recognized by our statutes and the law of nations; and as such direct evidence had not been furnished, and the plaintiff was not required to produce his counter evidence on a motion like that under consideration instead of at the trial, he was justified in retaining jurisdiction until the issue raised by the pleadings was regularly determined. But to this latter suggestion, counsel for petitioner answered in argument: "At any rate, in this court, exercising its appropriate jurisdiction to entertain an application for a writ of prohibition or mandamus, the respondent here is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege." This is undoubtedly the correct view. The question here is whether the District Court had jurisdiction, and not whether its order refusing to set aside the service of summons and the subsequent proceedings in the action, and dismissing the same, should be reversed. . . .

*431 * Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.

*432 We ought to add that while we have not cared to dispose * of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged

person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Our conclusion is, as already stated, that the District Court had jurisdiction, and we accordingly discharge the rule and

Deny the writs.[1]

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[1] In *Börs* v. *Preston* (11 U. S. 252), decided in 1884, it was held, as stated by the headnote, that "the constitutional grant of original jurisdiction to this court of all cases affecting consuls, does not prevent Congress from conferring original jurisdiction, in such cases, also, upon the subordinate courts of the Union."

The reasons supporting this interpretation are given by Mr. Chief Justice Taney in *Gittings* v. *Crawford* (Taney's Circuit Court Decisions, 1, 10), decided in 1838, who says, on the point of consuls:

"A consul is not entitled, by the law of nations, to the immunities and privileges of an ambassador or public minister. He is liable to civil suits, like any other individual, in the tribunals of the country in which he resides; and may be punished in its courts for any offence he may commit against its laws: Wheat. International Law 181; 1 Kent's Com. 43, 45. He, usually, is a person engaged in commerce; and in this country, as well as others, it often happens, that the consular office is conferred by a foreign government on one of our own citizens. It could hardly have been the intention of the statesmen who framed our constitution, to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the supreme court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul, in any part of the United States; that consul too, being often one of our own citizens. There is no reason, either of policy or convenience, for introducing such a provision in the constitution; and we cannot, with any probability, impute such a design to the great men who, with so much wisdom and foresight, framed the constitution of the United States; they have used no words expressly prohibiting congress from giving original jurisdiction in cases affecting consuls, to the inferior judicial tribunals of the United States; and in the absence of every express prohibition, I see no sufficient grounds to justify this court in implying it, and pronouncing, merely upon such implication, that the act of 1789 is unconstitutional and void."

The same subject is thus discussed in its larger aspects, including that of original jurisdiction of the Supreme Court in cases affecting ambassadors, public ministers and consuls, by Mr. Chief Justice Waite, in delivering the unanimous opinion of the Supreme Court in *Ames* v. *Kansas* (111 U. S. 449, 464), decided in 1884:

"It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden. . . .

"In this way States, ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose."—Editor.

The Paquete Habana.

Supreme Court of the United States, 1900.

[175 *United States,* 677.]

Under the act of Congress of March 3, 1891, c. 517, this court has jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the District Judge as to the importance of the particular case.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

At the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. And this rule is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

At the breaking out of the recent war with Spain, two fishing smacks—the one a sloop, 43 feet long on the keel and of 25 tons burden, and with a crew of three men, and the other a schooner, 51 feet long on the keel and of 35 tons burden, and with a crew of six men—were regularly engaged in fishing on the coast of Cuba, sailing under the Spanish flag, and each owned by a Spanish subject, residing in Havana; her crew, who also resided there, had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner; and her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Each vessel left Havana on a coast fishing voyage, and sailed along the coast of Cuba about two hundred miles to the west end of the island; the sloop there fished for twenty-five days in the territorial waters of Spain; and
* 678 the schooner extended her fishing trip a hundred * miles farther across the Yucatan Channel, and fished for eight days on the coast of Yucatan. On her return, with her cargo of live fish, along the coast of Cuba, and when near Havana, each was captured by one of the United States blockading squadron. Neither fishing vessel had any arms or ammunition on board; had any knowledge of the blockade, or even of the war, until she was stopped by a blockading vessel; made any attempt to run the blockade, or any resistance at the time of her capture; nor was there any evidence that she, or her crew, was likely to aid the enemy. *Held,* that both captures were unlawful, and without probable cause.

During the Spanish-American war of 1898 two small fishing smacks, the *Paquete Habana* and the *Lola* were respectively captured at sea by the U. S. gunboat *Castine* and the U. S. steamship *Dolphin,* and taken by their captors into Key West, Fla., where they were libelled and condemned as enemy's property, and sold under decree of the court. On appeal to the Supreme Court of the United States, the question before the court was, are fishing smacks, in the

absence of municipal law or treaty, protected from capture by the law of nations, and is such law of nations part of the municipal law of the United States?[1]

MR. JUSTICE GRAY delivered the opinion of the court. . . .

*700 * International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[2] For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot,* 159 U. S. 113, 163, 164, 214, 215.

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be

*701 affirmed that they are generally * impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by states-

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[1] This brief statement is substituted for the elaborate presentation of the facts and circumstances of the case contained in the opinion of Mr. Justice Gray.—Editor.

[2] In the leading case of *Triquet* v. *Bath* (3 Burrow, 1478), decided in 1764, Lord Chief Justice Mansfield quotes Lord Chancellor Talbot as saying, in the case of *Buvot* v. *Barbut* (Cases Tempore Talbot, 231), in which Mansfield, then at the bar, was counsel, "that the law of nations, in its full extent, was part of the law of England." And, relying upon the decree of Lord Talbot, Lord Chief Justice Mansfield said, in the case of *Triquet* v. *Bath,* that "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The act of Parliament of 7 Ann. c. 12, is declaratory of it. All that is new in this act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law."

In the leading case of *Heathfield* v. *Chilton* (4 Burrow, 2015), decided in 1767, Lord Mansfield said that "the privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Ann. c. 12 did not intend to alter nor can alter the law of nations."

It is of interest to note that Sir William Blackstone, the distinguished commentator on the laws of England, whose Commentaries were a text-book to the colonial and revolutionary statesmen, as they are even today in the United States, was of counsel in the Triquet case, just as Lord Mansfield, who decided it, was counsel in the case of *Buvot* v. *Barbut;* and that the law laid down by Lord Talbot and Lord Mansfield in these cases, contrary, it may be said, to Sir William Blackstone's contention, passed into his Commentaries, in which he said, in speaking of international law upon the authority of these cases:

"In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. (Commentaries on the Laws of England, Book IV, Chapter 5, published in 1769, seventh ed. 1775, p. 67.)—Editor.

men, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Weaton's International Law, (8th ed.) § 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of disinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations. . . .

*704 * The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations. Heffter, § 137; 2 Kaltenborn, § 237, p. 480; Bluntschli, § 667; Perels, § 37, p. 217. . . .

*705 * Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since,) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in § 148 of the fourth edition of his Treatise on International Law, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting *706 them as a general rule, and would capture * them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So T. J. Lawrence, in § 206 of his Principles of International Law, says: "The difference between the English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France, when Great Britain gave the order to capture them in 1800."

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice. . . .

*708 * This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analagous one, should be recognized and declared by a prize court.

*709 * By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice Admiralty there. But a petition for the restitution of a case of paintings and engravings, which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual

exercise of this courtesy between nations in former wars." *The Marquis de Somerueles,* Stewart Adm. (Nova Scotia) 445, 482.

In 1861, during the War of the Rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the
*710 purpose of the shipment in question gives to it a different * character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. *The Amelia,* 4 Philadelphia, 417. . . .

*711 * To this subject, in more than one aspect, are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime States, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which, when generally accepted, became of universal obligation." "This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we
*712 think, we may take judicial notice. Foreign municipal laws * must indeed be proved as facts, but it is not so with the law of nations." *The Scotia,* 14 Wall. 170, 187, 188. . . .

*714 * The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.[1]

*715 * MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, dissenting. . . .

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[1] In the case of the *Charming Betsy* (2 Cranch, 64, 118), decided in 1804, Mr. Chief Justice Marshall said, speaking for the Supreme Court:

"It has also been observed that an act of congress ought never to be construed to violate the law of nations, if any other public construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce further than is warranted by the law of nations as understood in this country."

In the case of *Bentzon* v. *Boyle* (9 Cranch, 191, 198), decided in 1815, Mr. Chief Justice Marshall said:

"The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognised by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but as these principles will be differently understood by different nations, under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon the law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

And in the *Nereide* (9 Cranch, 388, 423), decided in the same year, the same eminent Judge said: "Until such an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

The decision of the Supreme Court in the *Paquete Habana* is in accord with the opinions of publicists and the practice of nations, as appears from Article 3 of the Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war as adopted by the Second Hague Peace Conference on October 18, 1907. This article reads as follows:

"Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

"They cease to be exempt as soon as they take any part whatever in hostilities.

"The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In his report to the Conference, justifying the action of the Fourth Commission in this matter, Mr. Henri Fromageot, Reporter of the Commission and technical delegate of France, said:

"According to a very ancient custom, [See more particularly the old documents contained in Pardessus, *Collection de lois maritimes antérieures au XVIII*e siècle, vol. iv, p. 319.] coastal fishing vessels are considered exempt from capture in time of war, and it may be added that at the present day this practice is universally approved. [His Excellency Mr. Choate (*Actes et documents*, vol. iii, pp. 911, 913), mentioned, in this regard, the decision of the Supreme Court of the United States in the case of the fishing boats *Paquete Habana* and *Lola* (Decision of January 8, 1900, United States Supreme Court Reports, vol. 175, p. 677.)] Nevertheless it is, according to the country, more or less legally assured, and it may appear advisable to establish the principle definitively in a conventional provision. . . .

"The reason for this exemption is, and always has been, one of humanity. The favoured treatment is given, not to the fishing industry, but to the poor people who are engaged in it. Its object is not to protect one maritime industry more than another, but merely to avoid doing poor people, who are especially deserving of interest, an injury which would be of no benefit to the belligerent. However, it is clear that this favour should not become an obstacle to naval operations, and that it ceases to be justified if the fisherman engages in hostilities. . . .

"This project received a unanimous vote in Commission." (Scott, *The Reports to the Hague Conferences of 1899 and 1907*, Oxford 1917, pp. 733, 738-739.)—Editor.

V

IMMUNITY OF NATIONS AND OF STATES FROM SUIT.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. (*Hamilton in The Federalist, 2 vols., 1788, Vol. II, No. 81, p. 318.*)

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. (*Chief Justice Marshall in United States Bank* v. *Planters' Bank of Georgia, 9 Wheaton, 904, 907, decided in 1824.*)

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. (*Chief Justice Taney in Beers* v. *Arkansas, 20 Howard, 527, 529, decided in 1857.*)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established to be called a Court of Claims, . . . (*Act of February 24, 1855, 10 U. S. Statutes at Large, 612.*)

The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: . . .

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: . . . (*Act of March 3, 1911, Section 145, Judicial Code of the United States, 36 U. S. Statutes at Large, 1136.*)

Simon Nathan v. Commonwealth of Virginia.

Common Pleas, Philadelphia County, Pennsylvania, 1781.

[1 *Dallas*, 77, *Note*.]

A State of the American Union under the Articles of Confederation is immune from suit as is a nation of the society of nations.

A foreign attachment was issued against the commonwealth of Virginia, at the suit of Simon Nathan; and a quantity of cloathing, imported from
*78 France, belonging * to that state, was attached in Philadelphia. The delegates in Congress from Virginia, conceiving this a violation of the laws of nations, applied to the supreme executive council of Pennsylvania, by whom the sheriff was ordered to give up the goods. The counsel for the plaintiff, finding that the sheriff suppressed the writ, and made no return of his proceedings, obtained, September 20, 1781, a rule that the sheriff should return the writ, unless cause was shewn.

They contended, that the sheriff was a ministerial officer; that he could not dispute the authority of the court out of which the writ issues, but was bound to execute and return it at his own peril. 6 Co. 54. That those cases in England, where the sheriff was not compelled to return writs issued against ambassadors or their retinue, depended upon the stat. 7 Ann., c. 12, which did not extend to this state.

The *Attorney General,* on the part of the sheriff, and by direction of the supreme executive council, shewed cause, and prayed that the rule might be discharged. He premised, that though the several states, which form our federal republic, had, by the confederation, ceded many of the prerogatives of sovereignty to the United States, yet these voluntary engagements did not injure their independence on each other; but that each was a sovereign, "with every power, jurisdiction, and right, not expressly given up." He then laid down two positions. First: that every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void. Second: that a sheriff cannot be compelled to serve or return a void writ.

I. The first point he endeavoured to prove, by considering, first, the nature of sovereignty: and, secondly, the rules of law, relative to process issued against ambassadors, the representatives of sovereigns. He said, that all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent. That sovereigns, with regard to each other, were always considered as individuals in a state of nature, where all enjoy the same prerogatives, where there could be no subordination to a supreme authority, nor any judge to define their rights, or redress their wrongs. That all jurisdiction implies superiority over the party, and authority in the judge to execute his decrees: but there could be no superiority, where there was a perfect equality—no authority, where there was an entire independence. That the king of England, as sovereign of the nation, is said to be independent of all, and subject to no one but God: and his crown is styled imperial, on purpose to assert that he owes no kind of subjection to any potentate on earth. No compulsory action can be brought against him, even in his own courts. That a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrest, and not subject to its laws. Hence, this inference was drawn, that the court having no jurisdiction over Virginia, all its process against that State, must be *coram non judice,* and consequently void. 1 *Vatt.* p. 2. 133. 2 *Vatt.* 158. 1 *Blackst.* 141. 5 *Bac.* 450.

It was then observed, that there being no instance in our law books, of any process against a sovereign, it was proper to consider the rules of law relative to process against their representatives. The statute of Ann. was read, with the history of the outrage that gave birth to it; which act declares that all process against the person, or goods, or domestics of an ambassador shall be null and void, and all concerned in issuing or serving it, should be punished as infractors of the laws of nations. That this statute was not introductory of any rule, but barely declaratory of the laws of nations. That there was nothing new in it, except the clause prescribing a summary mode of punishment. That it was a part of the common law of the land before, and consequently extended to Pennsylvania. 4 *Blackst.* 67. 3 *Burr.* 1480. 4 *Burr,* 2016.

*79 * Hence it was concluded, that if process against an ambassador be null and void, *à fortiori,* shall it be void if issued against a sovereign?

That the true reason of the minister's exemption from process is the independence and sovereignty of the person he represents. And although by engaging in trade, he may so far divest himself of his public character, as to subject his goods to attachment, yet in every case where he represents his master, his property is sacred. But a sovereign cannot subject himself by implication: he must do it expressly. That though the goods of a sovereign, as well of an individual, might be liable for freight, or duties, or subject to forfeiture; yet in those cases, there was a lien on the goods, they were answerable, and the process was *in rem:* in this case it was *in personam;* and the goods were attached merely to compel the party's appearance to answer the plaintiff's demand. And no sovereign would submit to the indignity of doing this. Hence it was inferred that the writ was a mere nullity.

II. Upon the second point, authorities were read to explain the case produced by the plaintiff's counsel, and to shew a distinction between an erroneous and a void writ. That the sheriff was bound to execute and return the writ, although erroneous, if the court had jurisdiction. But when the court had no jurisdiction, the writ was void, and the sheriff was a trespasser if he dared to obey it; a void authority being the same as none. That in England, the sheriffs were never obliged to return a writ, if upon shewing cause, it appeared that the defendant was a public minister, or one of his domestics. 5 *Bac.* 431. *Salk.* 700. 2 *Barnes.* 1 *Wils.* 20. That suppressing the writ was not making the sheriff judge, because he was obliged to assign a reason for so doing: and on the legality of that reason, the court was now to determine.

He addded, that if the sheriff had attached the goods, he was liable to punishment, and to compel him to return his proceedings, was to oblige him to put his offence upon record, and to furnish testimony against himself. He finally observed, that the writ was void, or it was not. If void, the sheriff need pay no attention to it: if not void, he was obliged to execute it at all events; and if so, these inconveniences would follow. That any disaffected person, who happened to be a creditor of the United States might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army. That the states united or several, would never submit to put in special bail (which must be done to prevent judgment) and to answer before the tribunal of a sister state.

That the plaintiff was under no peculiar inconvenience. Every creditor of this state or of the United States lay under the same. If his demand was just, Virginia would, upon application, do what was right; if not, and flagrant injustice was done him, he might (if a subject of this state, and entitled to its protection) complain to the executive power of Pennsylvania. He concluded, with observing

on the importance of suppressing such measures as the present, at their first appearance, and of preserving the rights of sovereign states inviolate—and prayed that the rule might be discharged.

The counsel for the plaintiff insisted, that though Virginia was a sovereign state, yet this ought not to exempt her property in every case from the laws and jurisdiction of another state. That sovereignty should never be made a plea in bar of justice: and that the true idea of prerogative, was the power of doing good, and not, as it had sometimes been expressed, "the divine right of doing ill." That every person, and all property within this state, was subject to its jurisdiction, by so being within it, except a sovereign power, and the representative of a sovereign power, with his domestics and effects, which he holds as representative. That if an ambassador engages in trade, his property so engaged is liable to attachment, *Vatt. b.* IV. *sect.* 114. and if a sovereign state turns merchant, and draws or accepts bills of exchange, its property ought in like manner to be
*80 subject * to the law merchant, and answerable in the state where it happens to be imported. That sovereignty is better represented by persons than things: and as any or all the citizens of Virginia would be amenable to the jurisdiction of this state, if they were to come within its bounds, so there is no reason why property brought here should not be attached, as well as the citizen arrested.

That one sovereign may lay duties upon the goods of another: and this appears to have been the sense of congress, by their expressly stipulating, in the articles of confederation, that no duties should be laid by one state, on the property of another. That the goods, which were attached, were certainly liable for their freight: so if they had been imported contrary to law, they were subject to forfeiture: process against them might issue out of this court, and jurisdiction over them be exercised, the sovereignty of Virginia notwithstanding. That if a vessel belonging to Virginia, should be taken, as prize retaken, and libelled here, Virginia must submit her claim to the decision of the admiralty of Pennsylvania, and could not claim an exemption, on account of her sovereignty. That a sovereign state may waive its rights—and by the very act of importing merchandize, it subjects itself to the jurisdiction of the country. That all property in this state is under the protection of the government, and therefore should be answerable in its turn, and amenable to its laws.

That the statute of Ann. though declaratory, is only declaratory of the ideas which that parliament entertained of the laws of nations. These were often erroneous, and could not be binding on us. That whatever might be the case with regard to foreign ministers, by the articles of confederation, the delegates from Virginia were privileged only in their persons, and not in their goods: and as they represent the state, it was to be presumed, they enjoy every exemption that their sovereign expected or claimed.

They said, that whether Virginia was subject to, or exempt from, the jurisdiction of this state, in the present instance, was not the point now in question: it was only, whether the sheriff should or should not obey the command of the court. That by the writ, he was directed to return it to the court, and he was not to withhold the process in contempt of this order, and to stifle the proceedings in their birth. That the sheriff was to act under the judgment of the court, and if he had any doubt about the validity of the writ, he ought to return it. Then the court might, if cause was shewn, quash it as illegal. That his not being obliged to return process against ambassadors was owing to the statute of Ann: and this exemption was singular, and not to be extended here. That though a writ might be void, where the court had no jurisdiction of the cause, or issued a writ, which they had no authority to issue; yet the cause here was trespass upon the

case, of which the court may hold plea, and the process was a foreign attachment, which they certainly had authority to issue. That to suffer the sheriff to suppress writs at pleasure, was establishing a dangerous precedent, which in future would be greatly abused.

That the questions upon which this cause depended, were important, and deserved the fullest consideration: and that an appeal from one tribunal to another, was the right and the security of the subject. But if the writ was now to be suppressed, there could be no record to be removed, and the plaintiff was left without remedy. They finally observed, that this mode of applying to a court of judicature, to decide on the justice of the plaintiff's demand, was every way preferable to that proposed by the attorney general, of sending him to complain to the executive power, who could give him no redress, but by appealing to arms, and involving the state in a war. They therefore prayed, that the rule might be made absolute.

THE COURT held the matter some days under advisement—and at their next meeting THE PRESIDENT delivered it as the judgment of the court.

"That the rule made upon the sheriff, to return the writ issued against the commonwealth of Virginia, at the suit of Simon Nathan, should be discharged."

The Exchange

The Schooner Exchange v. McFadden and Others.

Supreme Court of the United States, 1812.

[7 *Cranch,* 116.]

A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.

The Exchange, 4 Hall's L. J. 231, reversed.[1]

THIS being a cause in which the sovereign right claimed by NAPOLEON, the reigning emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing, in preference to other causes which stood before it on the docket.

*117 *It was an appeal from the sentence of the Circuit Court of the United States for the district of Pennsylvania, which reversed the sentence of the District Court, and ordered the vessel to be restored to the libellants.

[The facts were that the American schooner *Exchange,* having been captured and confiscated by the French under the Rambouillet decree, which decree both the Executive and the Congress of the United States had declared to constitute a violation of the law of nations, was converted by the French Government into a man-of-war, and commissioned under the name of the *Balaou.* In this character the vessel came into a port of the United States, where she was libeled by the original American owners for restitution. In this suit a suggestion was made by the United States, setting forth the national character of the vessel, and invoking judgment upon the question whether she was subject to the local jurisdiction.]

*119 *On the 4th of October, 1811, the District Judge dismissed
*120 * the libel with costs, upon the ground, that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel. From this sentence, the libellants appealed to the circuit court, where it was reversed, on the 28th of October 1811.[2] From this sentence of reversal, the district attorney, appealed to this court.[3]

*135 * *March 3d,* 1812. All the Judges being present.

MARSHALL, *Ch. J.* delivered the opinion of the Court, as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the
*136 decision may conform to those principles * of national and municipal law by which it ought to be regulated.

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[1] February 24, 1812. Present, all the judges.

[2] For the opinion of Judge WASHINGTON, reversing the sentence of the district court, see 4 Hall's L. J. 232.

[3] A portion of the statement in the original report has been abbreviated and enclosed in the brackets.—Editor.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found if necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

*137 * A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory, with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the
*138 dignity of his nation, and it is to avoid this subjection * that the license has been obtained. The character to whom it is given, and the object for which it is granted equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive
*139 exemptions from territorial jurisdiction * which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by vio-

lating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and
*140 whose safety might greatly depend on retaining * the exclusive command and disposition of this force. The grant of a free passage therefore implies a waver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to enquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its
*141 irregular and improper * conduct. It may however well be questioned, whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war, generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the Court, for distinguishing their case from that of vessels which enter by express assent.

*142 * In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purpose of trade, who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility, if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned

for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the judisdiction of the place, it may safely be asserted, that the whole reasoning upon which such
*143 exemption has been implied in other cases, * applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent; the latter, in receiving the minister, consents to admit him on the footing of independency; and thus, there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private-ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

*144 * When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found,

and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the * property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

*145

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing for a debt due from the King of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships, would appear to proceed from the same opinion.

It seems then, to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered * as exempted by the consent of that power from its jurisdiction.

*146

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wave its jurisdiction.

The arguments in favor of this opinion, which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel, which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an enquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the juris-
*147 diction of our Courts, has a * right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is, therefore said to be the right, and if it be the right, it is the duty of the Court. to enquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States.

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

Joseph D. Beers, use of William A. Platenius, as Administrator of James Holford, deceased, Plaintiff in Error, v. The State of Arkansas.

Supreme Court of the United States, 1857.

[20 *Howard,* 527.]

Under the Constitution of the State of Arkansas, the Legislature passed a law allowing the State to be sued.

According to this law, a suit was brought upon some of the State bonds; and whilst the suit was going on, the Legislature passed another law, requiring the bonds to be filed in court, or the suit to be dismissed.

The suitor refusing to file his bonds, the suit was dismissed; and the case was carried to the Supreme Court of the State, where the judgment was affirmed.

The case, being brought to this court under the twenty-fifth section of the judiciary act, must be dismissed for want of jurisdiction.

The permission to bring the suit was not a contract whose obligations were impaired by the passage of the subsequent law.

*528 * These three cases depended upon the same principle, and are therefore classed together. The report in the first-named case will apply to them all. It was a case which was brought up from the Supreme Court of the State of Arkansas, by a writ of error, issued under the twenty-fifth section of the judiciary act.

The case is stated in the opinion of the court. . . .

Mr. Chief Justice TANEY delivered the opinion of the court.

This was an action of covenant, brought in the Circuit Court for Pulaski county, in the State of Arkansas, to recover the interest due on sundry bonds issued by the State, and which the State had failed to pay according to its contract.

The Constitution of the State provides, that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." And in pursuance of this provision, a law was accordingly passed; and it is admitted that the present suit was brought in the proper court, and in the manner authorized by that law.

The suit was instituted in the Circuit Court on the 21st of November, 1854. And after it was brought, and while it was pending in the Circuit Court, the Legislature passed an act, which was approved on the 7th of December, 1854, which provided, "that in every case in which suits or any proceedings had been instituted to enforce the collection of any bond or bonds issued by the State, or the interest thereon, before any judgment or decree should be rendered, the bonds should be produced and filed in the office of the clerk, and not withdrawn until final determination of the suit or proceedings, and full payment of the bonds and all interest thereon; and might then be withdrawn, cancelled, and filed with the State treasurer, by order of the court, but not otherwise." And the act further provided, that in every case in which any such suit or proceeding had been or might be instituted, the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross bill, require the original bond or bonds to be produced and filed; and if that

were not done, and the bonds filed and left to remain filed, the court should, on the same day, dismiss the suit, proceeding, or cross bill.

Afterwards, on the 25th of June, 1855, the State appeared to the suit, by its attorney, and, without pleading to or answering the declaration of the plaintiff, moved the court to require him to file immediately in open court the bonds
*529 on which the * suit was brought, according to the act of Assembly above mentioned; and if the same were not filed, that the suit be dismissed.

Upon this motion, after argument by counsel, the court passed an order directing the plaintiff to produce and file in court, forthwith, the bonds mentioned and described in the declaration. But he refused to file them, and thereupon the court adjudged that the suit be dismissed, with costs.

This judgment was afterwards affirmed in the Supreme Court of the State, and this writ of error is brought upon the last-mentioned judgment.

The error assigned here is, that the act of December 7, 1854, impaired the obligations of the contracts between the State and the plaintiff in error, evidenced by and contained in each of the said bonds, and the endorsement thereon, and was therefore null and void, under the Constitution of the United States.

The objection taken to the validity of the act of Assembly cannot be maintained. It is an act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the State is a party defendant, and nothing more.

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provi-
*530 sions were necessary to protect the public interest; and * no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the Legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power, the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.

Nor has the State court, in the judgment brought here for review, decided anything but a question of jurisdiction. It has given no decision in relation to the validity of the contract on which the suit is brought, nor the obligations it created, or the rights of parties under it. It has decided, merely, that it has no right under the laws of the State to try these questions, unless the bonds given by the State are filed. The plaintiff refused to file them pursuant to the order of the court, and the case was thereupon dismissed, for want of jurisdiction in the court to proceed further in the suit. There is evidently nothing in the decision, nor in the act of Assembly under which it was made, which in any degree impairs the obligation of the contract, and nothing which will authorize this court to reverse the judgment of the State court.

The writ of error must therefore be dismissed, for want of jurisdiction in this court.

The two cases of William A. Platenius, administrator of James Holford, against the State of Arkansas, in covenant, are the same in all respects with the one above decided, and must also, for the same reasons, be dismissed for want of jurisdiction.

The Siren.

Supreme Court of the United States, 1868.

[7 *Wallace,* 152.]

1. A claim for damages exists against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever, the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or claimants, as do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy.
2. By the admiralty law, all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them.

   These principles were thus applied:

   A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by the collision: *Held,* that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors.
3. The District Court of the United States, sitting as a prize court, may hear and determine all questions respecting claims arising *after* the capture of the vessel.

APPEAL from the District Court for Massachusetts.

The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer Gladiolus, belonging to the navy of the United States. She was placed in charge of
*153 a prize master and crew, and ordered to the port of Boston * for adjudication. On her way she was obliged to put into the port of New York for coal, and, in proceeding thence through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop Harper, loaded with iron, and bound from New York to Providence, Rhode Island. The collision was regarded by this court, on the evidence, as the fault of the Siren.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was, in April following, condemned as lawful prize, and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, in compliance with the act of Congress, where they now remain, subject to the order of the court.

In these proceedings the owners of the sloop Harper, and the owners of her cargo, intervened by petition, asserting a claim upon the vessel and her proceeds, for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds.

The District Court held that the intervention could not be allowed, and dismissed the petitions; and hence the present appeals. . . .

Mr. Justice FIELD delivered the opinion of the court.

*154 It is a familiar doctrine of the common law, that the * sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in *United States* v. *Clarke*.[1]

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suit against its property.

But although direct suit cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond

[1] 8 Peters, 444.

the demand or property in controversy. In *United States* v. *Ringgold,*[1] a claim of the defendant was allowed as a set-off to the demand of the government. "No
*155 direct suit," said the court, "can be maintained against the United States. * But when an action is brought by the United States to recover moneys in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress." So in *United States* v. *Macdaniel,*[2] to which reference is made in the case cited, the defendant was allowed to set off against the demand of the government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question, said the court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held that the government had no right, legal or equitable, to the money.

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem,* except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose. . . .

*158 * The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained.

*159 Thus, if the government, having the title to land subject to the * mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. Assuming, therefore, that the Siren was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is

[1] 8 Peters, 150.

[2] 7 Ib. 16.

no authority, that we are aware of, which would exempt them under these circumstances, because of the exemption of the government from a direct proceeding *in rem* against the vessel whilst in its custody. . . .

*162 * It does not appear that the court below considered the evidence as to the character and extent of the alleged tort. It appears to have placed its decision entirely upon the legal proposition, that the captured vessel was exempt from legal process at the suit of the intervenors, and that consequently the proceeds of the vessel could not be subjected to the satisfaction of their claims. We have, however, looked into the evidence, and are satisfied that the collision was the fault of the Siren. It took place in the daytime. The sloop was seen from the steamer in time to avoid her. The steamer was out of the regular track for steamers passing through Hurlgate. The passage is noted for its difficul-

*163 ties and dangers, * and, under the laws of New York, pilots are specially commissioned to take vessels through it. The prize master engaged a pilot for the Sound to take the steamer from New York to Boston, but refused to engage a Hurlgate pilot, his reason being to avoid expense. With such a pilot she would have been taken in the regular track of steamers northward of Blackwell's Island, and so close to Flood Rock as to avoid the sloop, as might easily have been done. We do not think it important to cite from the evidence in vindication of our conclusion, especially as it was not seriously contested on the argument that the Siren was responsible for the collision.

The decree must be REVERSED, and the cause remanded to the court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

ORDERED ACCORDINGLY.[1]

Mr. Justice NELSON, dissenting. . . .

Clark, General Treasurer of Rhode Island, v. Barnard & Others, Assignees.

Supreme Court of the United States, 1883.

[108 *United States,* 436.]

The voluntary appearance of a State waives the privilege of immunity from suit.

Bill in equity by the assignees in bankruptcy of the Boston, Hartford & Erie Railroad to restrain the treasurer of the State of Rhode Island from receiving $100,000 in the possession of the court, the proceeds of a loan certificate of the city of Boston, which was lodged with the State by the bankrupt as security

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[1] In *The Davis* (10 Wallace, 15, 19–20), decided in 1869, Mr. Justice Miller, delivering the unanimous opinion of the court, said:

"We are quite satisfied with the reasons on which the principle rests, and are of the opinion that when the property of the Government has been saved from destruction by salvors, or by those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition. . . .

There are some expressions in the opinion of this court in the case of *The Siren,* which seem to imply that no suit *in rem* can be instituted against property of the United

for the performance of its bond for that amount given to the State in pursuance of law to secure the construction of an extension of its road in Rhode Island, the extension never having been made. The facts appear in detail in the opinion of the court. The main questions discussed in argument were: The power of the corporation to make the agreement with the State; the rights of the parties in the absence of the State; the effect of an appearance by the State for the purpose of claiming the fund after it had been paid into court; and the measure of damages on the breach of the condition of the bond. . . .

*442 * MR. JUSTICE MATTHEWS delivered the opinion of the court. . . .[1]

*447 * The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always

*448 open to it as a suitor in controversies between it and * citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby

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States under any circumstances. But a critical examination of the case and the reasoning of the court, will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. In that case a prize, after capture and before condemnation, had collided with another vessel and was in fault, and it was held that as the government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the *res* in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. It was not, therefore, necessary to define all the circumstances under which the court, having control of the *res,* might enforce a lien on property of the United States; and the learned judge who delivered the opinion cites with approval the case of *The Light Boats,* in 11 Allen, in which the doctrine is laid down and well supported that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of *The Siren.*"

In *Case* v. *Terrell* (11 Wallace, 199, 201-2), decided in 1870, Mr. Justice Miller, speaking for the court, and having referred to *The Siren* and *The Davis,* thus continued:

"In the case of *United States* v. *Eckford* (6 Wallace, 484), decided in 1867, it was held that, although in a suit in which the United States was a plaintiff, a set-off could be pleaded and allowed, yet no judgment could be rendered for a balance found to be due the defendant by the verdict of the jury, either in the circuit court where the case was tried, or in the court of claims, which suit has been brought on the verdict. It is true that in the two last cases cited above, it was held that in a case in admiralty where the *res* was rightfully before the court, and was taken into possession by its officer without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in the Government, but, in these cases, the Government came into court of its own volition, to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."—Editor.

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[1] Only that portion of the opinion of the Court is given which deals with the question of jurisdiction.—Editor.

made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of *Georgia* v. *Jesup,* 106 U. S. 458, where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. . . .

For these reasons the decree of the circuit court is reversed, and the cause is remanded with instructions to enter a decree in favor of the State of Rhode Island for the sum of $100,000, payable out of the fund in court, with so much interest thereon, if any, as has accrued on that sum since the 1st day of January, 1872, which is the date when the amount became due.

And it is accordingly so ordered.

State of Minnesota v. Hitchcock.

Supreme Court of the United States, 1902.

[185 *United States,* 373.]

The original jurisdiction, vested by the Constitution in this Court over controversies in which a State is a party, is not affected by the question whether the State is a party plaintiff or party defendant.

A dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding.

The United States are to be taken, for the purposes of this case, as the real party in interest adverse to the State.

This court has jurisdiction of this controversy, and is called upon to determine the case on its merits. . . .

This is a suit in equity, commenced in this court by the State of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any sections 16 and 36 in what was on January 14, 1889, known as the Red Lake Indian reservation. . . .

*382 * Mr. Justice Brewer delivered the opinion of the court.

A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject-matter. The question

having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original and not of the appellate jurisdiction. The pertinent constitutional provisions are found in section 2 of article III, as follows:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

*383 "In all cases affecting ambassadors, other public ministers * and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a State shall be a party." This paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the first paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the State of Minnesota is a party to this litigation. It must also appear that the case is one to which by the first paragraph the judicial power of the United States extends. There are three clauses in the first paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a State and citizens of another State;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party." To bring the case within the first clause referred to, the bill alleges that the defendant, Ethan Allen Hitchcock, Secretary of the Interior, is a citizen of Missouri, and the defendant, Binger Herman, Commissioner of the General Land Office, a citizen of Oregon, and therefore it is said the case comes strictly within the language of the first paragraph in that there is presented a controversy between a State, Minnesota, and citizens of other States. To that it may be replied that there is no real controversy between the State, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should die or resign and a citizen of Minnesota

*384 be * appointed in his place, the jurisdiction of the court would cease, and this although the real parties in interest remain the same. In respect to the second it may be said that if it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the

United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution. As to the third, it may be objected that the United States is not in terms a party to the litigation and has no pecuniary interest in the controversy, it being in reality one between the State and the Indians.

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.

The case of *United States* v. *Texas,* 143 U. S. 621, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the State of Texas to determine the title to a tract, called the county of Greer, which was claimed by the State to be within its limits and a part of its territory, and by the United States to be outside the State of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained. After referring to the provisions of the Constitution and the judiciary act of 1789, Mr. Justice Harlan, speaking for the court, said:

*385 * "The words in the Constitution, 'in all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. . . .

"It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined by the Constitution. That instrument extends the judicial power of the United States 'to *all* cases,' in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in *all* cases' 'in which a State shall be party,' that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending

the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some
386* tribunal was not entrusted the power to determine * them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State." (p. 643.)

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.

It may be said that the United States is not named as defendant, and therefore it cannot be considered a party to the controversy. It is true that it was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," was applicable only to cases in which the State was named in the record as a party defendant. *Osborn* v. *United States Bank,* 9 Wheat. 738. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "the State, though not named, is the real party against which the relief is asked, and the judgment will operate." *In re Ayers,* 123 U. S. 443. Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the Government cannot be sued except by its consent, nor within the rule established in the *Ayers* case.

*387 * Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the

record but by the question of the effect of the judgment or decree which can be entered.

But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility. On March 2, 1901, it passed the following act:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney General upon the request of such Secretary." 31 Stat. 950.

*388 * It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purposes of the litigation, stand as the real party in interest, and so far as it could within constitutional limits has expressed the consent of the Government to the maintenance of this suit in this court. By the act it, in effect, declares that it waives all objections on the ground that it is a mere trustee; that it assumes the full responsibilities of ownership, and that it will, whatever may be the outcome of any litigation, stand responsible to the Indians for the full value of the lands in controversy. Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed? If it stands as such owner, then within the proposition heretofore referred to a suit which is against its agents, not affecting them individually, but affecting only its title to the real estate, is in substance and effect a suit against the United States. The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and, therefore, the case is within the first paragraph, as one to which the judicial power of the United States extends.

Our conclusion, therefore, is that the original jurisdiction vested by the Constitution in this court over controversies in which a State is a party is not affected by the question whether the State is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the State. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits. . . .

People of Porto Rico v. Rosaly y Castillo.

Supreme Court of the United States, 1913.

[227 *United States,* 270.]

The government of Porto Rico cannot be sued without its consent.

The government of Porto Rico, as established by the Organic Act, with some possible exceptions, comes within the general rule exempting a government sovereign in its attributes.

That government of Porto Rico, as established by the Organic Act of April 12, 1900, is a strong likeness of that established for Hawaii which has immunity from suit. *Kawananakoa* v. *Polyblank,* 205 U. S. 349.

The provision in § 7 of the Organic Act of Porto Rico that the people of Porto Rico shall have power to sue and be sued is not to be construed as destroying the grant of sovereignty given by the act itself.

Like words may have one significance in one context and a different signification in another.

In construing an organic act of a Territory this court will consider that Congress intended to create a government conforming to the American system of divided powers—legislative, executive and judicial—and did not intend to give to any one branch of that government power by which the government itself so created could be destroyed.

The words "to sue and be sued" as used in § 7 of the Organic Act of Porto Rico, when construed in connection with the grant of governmental powers therein contained, amount only to a recognition of a liability to be sued in case of consent duly given.

16 Porto Rico, 481, reversed.

*271 * The facts, which involve the construction of § 7 of the Organic Act of Porto Rico and whether the Government of that Island can be sued without its consent, are stated in the opinion. . . .

*273 * Mr. Chief Justice White delivered the opinion of the court.

The appellee was plaintiff in the first instance. The defendants were The People of Porto Rico (the Government of the Island) and several named individuals. Recovery was sought of property in possession of the defendants and for rents and profits. The individual defendants defaulted. The Government defended and from a judgment ousting it from the property and for rents and profits appealed to the Supreme Court. The court, giving its reasons for affirmance, thus stated the only issue presented and which was decided: "The appeal was taken by The People of Porto Rico, and the only ground alleged in support thereof was that, inasmuch as The People of Porto Rico could not be sued without its consent, and such consent not appearing to have been given in this case, the District Court had acted without jurisdiction, and the judgment rendered by it was null and void." The court did not overlook the importance of the question, as is shown by its careful and perspicuous opinion. A member of the court fully stated his reasons for dissenting. On this appeal, taken by The People of Porto Rico, the case having been tried without a jury, the question for decision is narrower than would seem to be the case regarding alone the general terms in which the question is mentioned in the passage previously quoted from the opinion of the court below.

It is not open to controversy that aside from the existence of some exception the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its at-

tributes from being sued without its consent. In the first place, this is true because in a general sense so far as concerns the frame work of the Porto Rican government and the legislative, judicial and executive authority with which
*274 it is endowed there is, if not a * complete identity, at least in all essential matters, a strong likeness to the powers usually given to organized Territories and moreover a striking similarity to the Organic Act of the Hawaiian Islands (Act of April 30, 1900, chap. 339, §§ 6, 55; 31 Stat. 141, 142 and 150). But as the incorporated Territories have always been held to possess an immunity from suit and as it has been moreover settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico. *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353. This, moreover is additionally beyond question because in considering the nature and character of the government of Porto Rico in *Kopel* v. *Bingham,* 211 U. S. 468, it was said (p. 476): "It may be justly asserted that Porto Rico is a completely organized Territory, although not a Territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a Territory . . ." Besides, in *Gromer* v. *Standard Dredging Company,* 224 U. S. 362, in considering the subject and giving due weight to "the precaution against abuse" of the Porto Rican legislative power and after calling attention to the reservation made by Congress of the right to repeal any Porto Rican act of legislation, it was nevertheless declared (p. 370): "The purpose of the act is to give local self-government, conferring an autonomy similar to that of the States . . . " There being, then, no doubt that immunity from suit without its consent is necessarily inferable from a mere consideration of the nature of the Porto Rican government the issue is whether there is any ground which removes Porto Rico from the general rule. That such an exception is the result of the concluding portion of § 7 of the Organic Act was the sole basis upon which the court below rested its conclusion and the correctness of that view is the only issue we are called upon to decide.

*275 * The section in question, § 7, is the one which enumerates the classes of persons who by the act are made constituent elements of the government for which the act provides, and after making such enumeration the section declares that the persons embraced in its provisions "shall constitute a body politic under the name of The People of Porto Rico with governmental powers as hereinafter conferred and with power to sue and be sued as such."

Unquestionably the provision disconnected from its context would sustain the conclusion that there exists a general liability to be sued without reference to consent. Indeed, the words to sue and be sued are but a crystallized form of expression resorted to for the purpose of aptly stating the right to sue and the liability to be sued, which springs from a grant of corporate existence, private or public. But this does not solve the question here arising, which is the meaning of the words in the act under consideration, for it may be that like words may have one significance in one context and a different signification in another. And this is made clear by bearing in mind that as usually applied the words to sue and be sued but express implications as to the existence of powers flowing from the matter to which they relate, while here if the words have the meaning insisted on they serve, if not to destroy, at least to seriously modify or greatly restrict the grant of powers conferred by the organic act. The destructive po-

tency of the words if given the meaning insisted upon is self-evident since the claim here is that they denature the government created by the organic act by depriving it of an immunity which has been frequently decided by this court would otherwise necessarily arise from the scope of the powers conferred. As, however, a full appreciation of the operation of the words, if they are interpreted as insisted upon, affords the truest means of ascertaining their real signification, we do not rest content with that which is self-evident, but pursue
*276 the subject further. * The proposition is that by giving to the words the meaning insisted upon it has come to pass that the existence of claims of every kind and nature, whether in contract or in tort against the government, is a matter for exclusive judicial determination. But as the essence of paramount judicial power over a subject confers the authority and imposes the duty to enforce a judgment rendered in the exercise of such power (*Gordon* v. *United States,* 117 U. S. 697, 702; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 457; *District of Columbia* v. *Eslin,* 183 U. S. 62, 65), it follows that the contention is that the government created by the Organic Act is not the character of government which this court has declared it to be in the cases to which we have referred, that is, one founded upon the American system, but is, on the contrary, one in which the legislative power concerning claims of every kind against the government is subordinated to the judicial. That such was the view taken by the court below of the result of the meaning which it affixed to the clause in question was plainly stated in the opinion as follows (16 Porto Rico, 487):

"The presence of the words 'with power to sue and be sued,' in our Organic Act, cannot be ascribed to an oversight of Congress, but, on the contrary, it may be presumed that Congress employed them having in mind the obligations contracted in the Treaty of Paris, and with the desire of giving to the persons included in its stipulations ready access to courts of justice, against any invasion of their rights by governmental action. And indeed, there should be no fear of entrusting to the courts the protection, not only of the persons mentioned in the treaty, but of any other persons, without excluding The People of Porto Rico. This has been demonstrated sufficiently by an experience of more than ten years."

In view, however, of the terms of the Organic Act, of the prior
*277 decisions recognizing that the purpose of * Congress in adopting it was to follow the plan applied from the beginning to the organized Territories by creating a government conforming to the American system with defined and divided powers, legislative, executive and judicial, in further view of the fact that the exercise of the judicial power here claimed would be destructive of that system, we are of opinion that it cannot be supposed that Congress intended by the clause in question to destroy the government which it was its purpose to create. In a sense the words "to sue and be sued," applied, as they normally have been, in grants of private or public charters, are redundant, since they but express the existence of powers which would naturally be implied. It may be true also to say that if they be likewise confined in the case before us they will also be in a sense redundant. Despite this, we think they should be construed with reference to the powers conferred by the provisions to which they relate, and therefore cannot be treated as destructive of the authority otherwise conferred by the act. Thus interpreting the clause, it is but an expression of the power to sue arising from the terms of the Organic Act and a recognition of a liability to be sued consistently with the nature and character of the government,

that is, only in case of consent duly given. The words, "shall have the governmental powers hereinafter conferred and with the power to sue," etc., exclude the possibility in reason of holding that the right to sue and be sued which was given "and with," that is, because of or along with the powers conferred—was intended to or does distort or limit the powers of government which the act conferred.

Reversed.

People of Porto Rico v. Ramos.

Supreme Court of the United States, 1914.

[232 *United States*, 627.]

Immunity of sovereignty from suit without consent does not permit the sovereign to reverse the action invoked by it so that it may come in and go out of court at will without the right of the other party to resist either step.

While Porto Rico may not in ordinary actions be sued without its consent, a voluntary appearance after due consideration and request to be made a party by the Attorney General on the ground of interest in the controversy, amounts to a consent, and thereafter Porto Rico cannot object to the jurisdiction on account of its immunity as a sovereign. *Porto Rico* v. *Rosaly*, 227 U. S. 270, distinguished.

*628 * Where the District Court of the United States for Porto Rico had jurisdiction of an action involving title to real estate brought by a citizen of Porto Rico against a foreign subject, the jurisdiction is not ousted because Porto Rico becomes, on the application of the Attorney General, the sole party defendant.

Quære, whether Porto Rico cannot be made a party defendant without its consent to an action involving title to real estate claimed to be an escheat.

THE facts, which involve the immunity of sovereignty from suit as applied to Porto Rico and the determination of what constitutes consent to be sued, are stated in the opinion. . . .

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in ejectment for certain described lands in Porto Rico brought by defendant in error, a citizen of Porto Rico, against Eduardo Wood, a subject of Great Britain.

Defendant in error alleged in his complaint that he was the owner, possessed and entitled to the possession of the lands and that Wood, claiming that the property belonged to the estate of Eliza Kortright, of which he was the duly appointed administrator, without right or title entered upon the lands and ejected defendant in error therefrom. Restitution of the lands was prayed and damages in the sum of $5,000.

The complaint was filed November 12, 1909, and process duly issued thereon. On November 19, 1909, the defendant, Wood, filed a paper entitled "Motion to make the People of Porto Rico a party defendant and for an

*629 * extension of time to plead." It was alleged in the motion that the

People of Porto Rico had been declared and adjudged to be the sole heir of Eliza Kortright by an order made by the District Court in and for the Judicial District of San Juan, she having died intestate and without leaving any legal heirs.

That the People of Porto Rico, by virtue of such declaration of heirship, have an interest in the result of the suit and ought to be joined as co-defendants.

That the defendant desired an extension of time to file a demurrer or answer to the complaint, as he might be advised, to the 2nd of December, 1909.

An order was prayed making the People of Porto Rico a party, for service upon them, and that time for pleading be extended.

Subsequently defendant filed an answer denying each and every material allegation of the complaint and prayed a dismissal of the action.

The case, by consent, was subsequently set for trial and a jury empaneled. Thereupon Harvey M. Hutchinson, representing the Attorney General of Porto Rico, petitioned the court for a continuance of the trial for time to enable him to ascertain if the People of Porto Rico should be made a party defendant to the cause. In pursuance of the petition the court continued the case. Upon the date to which the cause was continued Hutchinson again, as representing the Attorney General of Porto Rico, appeared in behalf of the People of Porto Rico and represented to the court that the People of Porto Rico were interested parties to the action. The court thereupon ordered the People of Porto Rico to be made a party. The jury was excused, the cause continued and the plaintiff (defendant in error) was "directed to amend his complaint so as to show the People of Porto Rico to be a party defendant."

*630 An amended complaint was filed December 15, 1910. * It alleged the plaintiff to be a citizen of Porto Rico and the defendant "a body politic, created by the Congress of the United States being a citizen thereof." That plaintiff was the owner of a "rustic estate," describing it, and in possession thereof, and that one Eliza Kortright, since deceased, ejected plaintiff therefrom and continued in possession thereof up to her death. That, therefore, her estate was placed under judicial administration under the direction of Eduardo Wood, as judicial administrator, which judicial administration ceased during the month of November, 1910, and the administrator discharged. That, therefore, the defendant, The People of Porto Rico, was adjudged by the District Court of San Juan the only heir to the estate of Eliza Kortright, as she left no heirs. That The People of Porto Rico, as such heir continues to possess the land without right or title thereto, against the will of plaintiff, and to his damage in the sum of $6,000, which sum was prayed as rents and profits, together with restitution of the land.

Upon motion of the Attorney General of Porto Rico his name was entered as counsel for The People of Porto Rico and leave granted to file a demurrer.

The demurrer recited that the Attorney General appeared specially for the sole purpose of challenging the jurisdiction of the court in the case and demurred to the amended complaint for the following reasons: (1) Because the suit was one between plaintiff, a citizen of Porto Rico, and The People of Porto Rico as sole defendant, and that both plaintiff and defendant being citizens of Porto Rico within the meaning of the act of Congress conferring jurisdiction on the court, the court had no jurisdiction. (2) Because The People of Porto Rico

as a recognized entity, was so far a sovereign as to be exempt from suit at the instance of private individuals.

The demurrer was overruled and on the eleventh of January, 1911,
*631 an answer was filed in which defendant * insisted and pleaded that it "had such attributes of sovereignty" as exempted it from suit. The rest of the answer denied the allegations of the complaint and set up judgments obtained in two separate suits brought by Eliza Kortright against defendant in error in which it was adjudged against him that she was the owner of the lands sued for by plaintiff in the present action.

The action was tried to a jury which found for plaintiff (defendant in error) and assessed damages at $6,000, in accordance with which judgment was entered. A new trial was moved and denied, and this writ of error granted.

But one contention is argued, that is, that the District Court had no jurisdiction to entertain the suit against Porto Rico "without its consent and against its active opposition." *Porto Rico* v. *Rosaly,* 227 U. S. 270, is cited to sustain the contention. It was said in that case that the government "established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy, and, against the opposition of the plaintiff (defendant in error), it was made a party defendant. And this action was not improvident. Its Attorney General took time to consider. He applied for and obtained a continuance of the case to determine the best course to secure the interests of the People of Porto Rico, whether to assert its rights in the then litigation or attempt to keep them under the immunity of its sovereignty from attack. His decision had the support of substantial reasons. The property came to Porto Rico as an escheat, and came therefore as it was held by Eliza Kortright and Wood. If held in wrong by them, it was held in wrong by it, and the Attorney General may have considered it well worth
*632 * while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. *United States* v. *Lee,* 106 U. S. 196; *Stanley* v. *Schwalby,* 147 U. S. 508. But, whatever his reasons, he certainly asked for time, as we have seen, "to enable him to ascertain if the People of Porto Rico should be made a party defendant" in the cause, and, having been granted the time, he appeared again in the cause and represented to the court that Porto Rico was an interested party to the action, and the court, having heard the arguments of opposing counsel, ordered Porto Rico to be made a party and directed plaintiff to amend his complaint in execution of the order. Porto Rico, therefore, through its Attorney General, not only gave its consent to be a party to the cause but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause.

The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.

In placing our decision upon the consent of Porto Rico to be made a party

defendant under the circumstances presented by this case, we do not wish to imply that Porto Rico could not have been made a party without its consent, the property being an escheat. As to that we express no opinion.

There is an assignment of error based on the proposition that by the amendment of the complaint the plaintiff and Port Rico became the sole parties to the action, and they being citizens of Porto Rico the court lost jurisdiction of it. The proposition is not urged by plaintiff in error in its brief, and *633 if the proposition did not raise a question of * jurisdiction we might pass it without comment. It is, however, enough to say of it that the original defendant Wood was properly sued, he then being a subject of Great Britain and in possession of the land. Porto Rico subsequently becoming a party did not oust the jurisdiction. *Phelps* v. *Oaks,* 117 U. S. 236; *Hardenbergh* v. *Ray,* 151 U. S. 112.

Judgment affirmed.

Suability of the United States in Court of Claims.

The Judicial Code of the United States, 1911.

[36 *Statutes at Large,* 1135.]

SEC. 136. The Court of Claims, established by the act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. (*36 Stat. L., 1135.*) . . .

SEC. 143. On the first day of every regular session of Congress the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptroller, and the Auditors of the Treasury; to the Commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States. (*36 Stat. L., 1136.*) . . .

SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible. (*36 Stat. L., 1137.*) , , ,

SEC. 148. When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents and proofs pertaining thereto, to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might, under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication. (*36 Stat. L., 1137.*)

SEC. 149. All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations. (*36 Stat. L., 1138.*)

SEC. 150. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court. (*36 Stat. L., 1138.*)

SEC. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either

party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. (*36 Stat. L., 1138.*) . . .

SEC. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction. (*36 Stat. L., 1139.*)

SEC. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. . . . (*36 Stat. L., 1139.*) . . .

SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. (*36 Stat. L., 1141.*)

SEC. 178. The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. (*36 Stat. L., 1141.*)

SEC. 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. (*36 Stat. L., 1141.*)

SEC. 187. Reports of the Court of Claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon. (*36 Stat. L., 1143.*) . . .

SEC. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two. (*36 Stat. L., 1157.*)

SEC. 243. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct. (*36 Stat. L., 1157.*)

VI

SUITS BY INDIVIDUALS AGAINST STATES.

This extension of power is *remedial,* because it is to settle controversies. It is therefore, to be construed liberally. It is politic, wise, and good, that, not only the controversies, in which a State is *Plaintiff,* but also those in which a State is *Defendant,* should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. . . .

I wish the State of society were so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. (*Chief Justice Jay in Chisholm* v. *Georgia, 2 Dallas, 419, 476, 478, decided in 1793.*)

What is a suit? We understand it to be prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. . . .

To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. (*Chief Justice Marshall in Cohens* v. *Virginia, 6 Wheaton, 264, 408, decided in 1821.*)

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State." . . . That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. (*Chief Justice Marshall in Cohens* v. *Virginia, 6 Wheaton, 264, 406, decided in 1821.*)

Vanstophorst et al. v. State of Maryland.

Supreme Court of the United States, 1791.

[2 *Dallas,* 401.]

A commission for the examination of witnesses will not be awarded, even by consent, until commissioners are named.

The Attorney General (*Randolph*) moved, on behalf of the plaintiffs, that a commission should issue to examine witnesses in Holland; to which the opposite counsel assented, although the commissioners were not named.

But, BY THE COURT:—We will not award the commission, until commissioners are named.

This being done, the motion was granted.

Oswald, administrator, v. State of New York

Supreme Court of the United States, 1792.

[2 *Dallas,* 401.]

Motion for a *distringas* to compel appearance of defendant State at instance of private suitor of different State.

SUMMONS. In this case the Marshal had returned the writ served; and now *Sergeant* moved for a *distringas,* to compel an appearance on the part of the State.

*402 * While, however, the court held the motion under advisement, it was voluntarily withdrawn, and the suit discontinued.

Oswald, administrator, v. State of New York

Supreme Court of the United States, 1792.

[2 *Dallas,* 402.]

Return of process will be enforced, by rule on the marshal.

SUMMONS. *Ingersoll* moved for a rule on the marshal of the district of *New-York,* to return the writ in this cause; and, after advisement, THE COURT granted the rule in the following terms:

Ordered, That the marshal of the *New-York* district return the writ to him directed in this cause, before the adjournment of this court, if a copy of this rule shall be seasonably served upon him, or his deputy, or, otherwise, on the first day of the next term. And that in case of a default, he do shew cause therefor, by affidavit taken before one of the judges of the *United States.*

Oswald, administrator, v. State of New York

Supreme Court of the United States, 1793.

[2 *Dallas,* 415.]

Failure of State to appear or to show cause justifies judgment by default in suit brought by private suitor of different State.

PROCLAMATION was made in this cause, "that any person having authority to appear for the State of New-York is required to appear accordingly;" and no person appearing it was ordered, on motion of *Coxe,* for the Plaintiff,

BY THE COURT:—Unless the State appears by the first day of next Term to the above suit, or shew cause to the contrary, judgment will be entered by default against the said state.[1]

Chisholm, executor, v. State of Georgia.

Supreme Court of the United States, 1793.

[2 *Dallas,* 419]

A state may be sued, in the supreme court, by an individual citizen of another state. And in such suit judgment may be entered, in default of an appearance.

THIS action was instituted in *August* Term, 1792. On the 11th of *July,* 1792, the Marshal for the *district of Georgia* made the following return: "Executed as within commanded, that is to say, served a copy thereof on his excellency *Edward Telfair,* Esq. governor of the State of *Georgia,* and one other copy on *Thomas P. Carnes,* Esq. the Attorney General of said State.

ROBERT FORSYTH, *Marshal.*"

Upon which Mr. *Randolph,* the Attorney General of the *United States,* as counsel for the plaintiff, made the following motion on the 11th of *August,* 1792. "That unless the State of *Georgia,* shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said State, on the fourth day of the next Term, or shall then shew cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages shall be awarded." But to avoid every appearance of precipitancy, and to give the State time to deliberate on the measures she ought to adopt, on motion of Mr. *Randolph,* it was ordered by the Court, that the consideration of this motion should be postponed to the present Term. And now *Ingersoll* and *Dallas,* presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in arguing the question. The Attorney General, therefore, proceeded as follows:

Randolph, for the plaintiff. I did not want the remonstrance of *Georgia,* to satisfy me, that the motion, which I have made is unpopular. Before that remonstrance was read, I had learnt from the acts of another State, whose will must be always dear to me, that she too condemned it. On ordinary occa-
*420 sions, these dignified opinions might influence me greatly; but on * this, which brings into question a constitutional right, supported by my own conviction, to surrender it would in me be official perfidy.

It has been expressed, as the pleasure of the Court, that the motion should be discussed, under the four following forms:

1*st.* Can the State of *Georgia,* being one of the *United States* of *America,* be made a party-defendant *in any case,* in the Supreme Court of the *United States,* at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the State of *South-Carolina?*

2*d.* If the State of *Georgia* can be made a party defendant in certain cases, does an action of *assumpsit* lie against her?

3*d.* Is the service of the summons upon the Governor and Attorney General of the State of *Georgia,* a competent service?

4*th.* By what process ought the appearance of the State of *Georgia* to be enforced?

1*st.* The Constitution and the Judicial Law are the sources from which the jurisdiction of the Supreme Court is derived. The effective passages in the Constitution are in the second section of the third article. "The judicial power shall extend to controversies between a State and citizens of another State." "In cases in which a State shall be a party, the Supreme Court shall have original jurisdiction." The judicial act thus organizes the jurisdiction, delineated by the Constitution. "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except, also, between a State and citizens of other States and aliens, in which latter case, it shall have original, but not exclusive jurisdiction."

Upon this basis we contend:

1*st.* That the Constitution vests a jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State.

2*d.* That the judicial act recognizes that jurisdiction:

1*st.* That the Constitution vests a jurisdiction in the Supreme Court over a State as a defendant, at the suit of a private citizen of another State. Consult the letter of the Constitution, or rather the influential words of the clause in question. The judicial power is extended to controversies between a State and citizens of another State. I pass over the word "between," as in no respect indicating who is to be Plaintiff or who Defendant. In the succeeding paragraph we read a comment on these words, when it is said, that in cases, in which a State shall be *a party,* the Supreme Court shall have original jurisdiction. Is not a defendant *a*
*421 *party,* as well as a plaintiff? If authority * be necessary for so notorious a definition, recur to 1 *Harr. Chan. Pract. p.* 35. where it is observed, that "in this Court," that is, in the High Court of Chancery of *England,* "suits are generally commenced, prosecuted, and *defended* by *parties,* in their own names only." I might appeal, too, to a work of greater solemnity, and of greater obligation; the articles of confederation. In describing the mode, by which differences between two or more States shall be adjusted, they speak of a day to be assigned for the appearance of the *parties;* of each *party* alternately striking the names of the persons proposed as Judges; of either *party* neglecting to attend; of striking names in behalf of a *party* absent; of any of the PARTIES refusing to submit to the authority of the Court; and of lodging the sentence among the acts of *Congress* for the security of the *parties* concerned. Human genius might be challenged to

restrict these words to a plaintiff state alone. It is, indeed, true, that according to the *order* in which the controversies of a State are mentioned, the State is the first; and from thence it may be argued, that they must be those in which a State is first named, or plaintiff. Nobody denies, that the citizens of a State may sue Foreign subjects, or Foreign subjects the citizens of a State. And yet, the expression of the Constitution is, "between a State or the citizens thereof, and Foreign States, citizens or subjects." The order, in this instance, works no difference. In common language, too, it would not violate the substantial idea, if a controversy, said to be between A. B. and C. D. should appear to be between C. D. and A. B. Nay, the opportunity fairly occurs in two pages of the judicial article, to confine suits to States, as plaintiffs but they are both neglected, notwithstanding the consciousness which the convention must have possessed, that the words, unqualified, strongly *tended* at least to subject States as defendants.

With the advantage of the *letter* on our side, let us now advert to the *spirit* of the Constitution, or rather its *genuine and necessary interpretation.* I am aware of the danger of going into a wide history of the Constitution, as a guide of construction; and of the still greater danger of laying any important stress upon the preamble, as explanatory of its powers. I resort, therefore, to the *body* of it; which shews that there may be various actions of States, which are to be annulled. If, for example, a State shall suspend the privilege of a writ of *habeas corpus,* unless when in cases of rebellion or invasion the public safety may require it; should pass a bill of *attainder* or *ex post facto* law; should enter into any treaty, alliance, or confederation; should grant letters of marque and reprisal; should coin money; should emit bills of credit; should make anything
*422 but gold and silver coin a tender in payment of debts, should pass a * law impairing the obligation of contracts; should, without the consent of *Congress,* lay imposts or duties on imports or exports, with certain exceptions; should, without the consent of *Congress,* lay any duty on tonnage, or keep troops or ships of war in time of peace; these are expressly prohibited by the Constitution; and thus is announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty.

Are States then to enjoy the high privilege of acting thus eminently wrong, without controul; or does a remedy exist? The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. The common law has established a principle, that no prohibitory act shall be without its vindicatory quality; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation. In our solicitude for a remedy, we meet with no difficulty, where the conduct of a State can be animadverted on through the medium of an individual. For instance, without suing a State, a person arrested may be liberated by *habeas corpus;* a person attainted and a convict under an *ex post facto* law, may be saved; those, who offend against improper treaties, may be protected, or who execute them, may be punished; the actors under letters of marque and reprisal may be mulcted; coinage, bills of credit, unwarranted tenders, and the impairing of contracts between individuals, may be annihilated. But this redress goes only half way; as some of the preceding unconstitutional actions must pass without censure, unless States can be made defendants. What is to be done, if in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State? What, if a State should adulterate or coin money below the Congressional standard, emit bills of

credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a State should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State. It is not denied, that one State may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the State aggrieving. A distinction between the cases is supportable
*423 only on a supposed comparative inferiority of the * Plaintiff. But, the framers of the Constitution could never have thought thus. They must have viewed human rights in their essence, not in their mere form. They had heard, seen—I will say felt; that Legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as *America* was in the vices of old Governments, she had some incident to her own new situation: individuals had been victims to the oppression of States.

These doctrines are moreover justified: 1*st*. By the relation in which the States stand to the Federal Government: and, 2*d*. By the law of nations, on the subject of suing sovereigns: and, 3*d*. They are not weakened by any supposed embarrassment attending the mode of executing a decree against a State.

1*st*. I acknowledge, and shall always contend, that the States are sovereignties. But with the free will, arising from absolute independence, they might combine in Government for their own happiness. Hence sprang the confederation; under which, indeed, the States retained their exemption from the forensic jurisdiction of each other, and, except under a peculiar modification, of the *United States* themselves. Nor could this be otherwise; since such a jurisdiction was no where (according to the language of that instrument) *expressly* delegated. This Government of supplication cried aloud for its own reform; and the public mind of *America* decided, that it must perish of itself, and that the Union would be thrown into jeopardy, unless the energy of the general system should be increased. Then it was the present Constitution produced a new order of things. It derives its origin immediately from the people; and the people individually are, under certain limitations, subject to the legislative, executive, and judicial authorities thereby established. The States are in fact assemblages of these individuals who are liable to process. The limitations, which the Federal Government is admitted to impose upon their powers, are diminutions of sovereignty, at least equal to the making of them defendants. It is not pretended, however, to deduce from these arguments alone, the amenability of States to judicial cognizance; but the result is, that there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the Constitution, if they naturally mean, what I have asserted, from receiving an easy and usual construction. But pursue the idea a step further; and trace one, out of a multitude of examples, in which the General Government may be convulsed to its center without this judicial power. If a State shall injure an individual of another State, the latter must protect him by a remonstrance. What if this be ineffectual? To stop there would cancel his allegiance; one State can not sue another for such a cause; acquiescence is
*424 not to * be believed. The crest of war is next raised; the Federal head can not remain unmoved amidst these shocks to the public harmony. Ought then a *necessity* to be created for drawing out the general force on an occasion so replete with horror? Is not an adjustment by a judicial form far preferable? Are not peace and concord among the States two of the great ends of the Constitution? To be consistent, the opponents of my principles must say, that a State may not be sued by a foreigner.—What? Shall the tranquillity of our country be at the mercy of every State? Or, if it be allowed, that a State may be sued by a foreigner, why, in the scale of reason, may not the measure be the same, when the citizen of another State is the complainant?

Nor is the history of confederacies wholly deficient in analogy; although a very strict one is scarcely to be expected. A parade of deep research into the Amphyctionic Council, or the Achæan league, would be fruitless, from the dearth of historical monuments. With the best lights, they would probably be found, not to be positively identical with our union. So little did they approach to a National Government, that they might well be destitute of a common judicatory. So ready were the ancient Governments to merge the injuries to individuals in a State quarrel, and so certain was it, that any judicial decree must have been enforced by arms, that the mild form of a legal discussion could not but be viewed with indifference, if not contempt. And yet it would not be extravagant to conjecture, that all civil causes were sustained before the Amphyctionic Council.[1] What we know of the Achæan confederacy, exhibits it as purely national, or rather consolidated.—They had common Magistrates taken by rotation from the towns: and the amenability of the constituent cities to some Supreme Tribunal, is as probable as otherwise.[2] But, in fact, it would be a waste of time, to dwell upon these obscurities. To catch *all* the semblances of confederacies, scattered through the historic page, would be no less absurd, than to search for light in regions of darkness, or a stable jurisprudence in the midst of barbarity and bloodshed. Advancing then, into more modern times, the Helvetic Union presents itself; one of whose characteristics is, that there is no common judicatory. *Stanyan,* 117. Nor, does it obtain in *Holland.* But it cannot be concluded from hence, that the *Swiss* or the *Dutch,* the jealousy of whom would not suffer them to adopt a *National* Government, would deem it an abasement, to summon a State, connected as the *United States* are, before a National Tribunal. But our anxiety for precedents is relieved by appealing to the *Germanic Empire.* The jumble of fifty princi-
*425 palities together no more deserves * the name of one body, than the incoherent parts of Nebuchadnazzar's image. The *Princes* wage war without the consent of their paramount sovereign; they even wage war upon each other; nay upon the *Emperor* himself; after which it will add but little to say, that they are distinct sovereignties. And, yet both the *Imperial* Chamber, and the *Aulic* Council hear and determine the complaints of individuals against the *Prince.*[3]

It will not surely be required to assign a reason, why the Confederation did not convey a similar jurisdiction; since that scanty and strict paper was of so different a hue and feature from the Constitution, as scarcely to appear the child of the same family.

I hold it, therefore, to be no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the *United States.* At the same time, by way of anticipating an objection, I assert, that it will not follow, from these premises, that the *United States* themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminences. We have indeed known petitions of right, *monstrans de droit,* and even process in the Exchequer. But the first is in the style of entreaty; the second, being apparent upon the record, is so far a deduction from the royal title; the third, as in the Banker's case, in the 11th volume of the State trials, is applicable only, where the charge is claimed against the Revenue; and all of them are widely remote from an involuntary subjection, of the sovereign to the cognizance of his own Courts.

2d. But what if the high independency of dissevered nations remained uncontrouled among the *United States,* so far as to place the individual States no more within the sphere of the Supreme Court, than one independent nation is

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[1] See *Anacharsis, 3 Vol. p.* 300.

[2] See *Gast's Hist. of Greece, p.* 321.

[3] See *His. of Germanic Body, p.* 157. 8.

within the jurisdiction of another? It has been a contest amongst civilians, whether one *Prince* found within the territory of another, may be sued for a contract.[1] I do not assert the affirmative; but it is allowable to observe, that such a position, once conceded, would illustrate and almost settle the present inquiry. But the same author, who repudiates the former idea, is strenuous in the opinion, that where the *effects,* or property, of one *Prince* are arrested in the dominions of another, the proprietor *Prince* may be summoned before a tribunal of that other. Now, although, each State has its separate territory, in one sense, the whole is that of the *United States,* in another. The jurisdiction of this Court reaches to *Georgia,* as well as to *Philadelphia.* If therefore the process
*426 could be commenced in *rem,* the authority * of *Bynkershoek* would justify us; and whether it be commenced in *rem,* or in *personam,* the principle of amenability is equally avowed.

3*d*. Nor will these sentiments be weakened by the want of a special provision in the Constitution for an execution; since it is so provided in no case, not even where States are in litigation. This will be more properly arranged under the following head concerning the judicial act.

I. 1. The judicial act recognises the jurisdiction over States. Instead of using the first expression in the Constitution, to wit, "controversies *between,* &c." it adopts the second, namely, "where a State shall be a party." Thus it makes no distinction between a State as Plaintiff, or as Defendant; but evidently comprehends in the word *"party"* a State, as Defendant, in one case at least, where a State is opposed to a State. This, after what has been said, need not be further pressed.

2. The master-objection is, that the law has prescribed no execution against a State; that none can be formed with propriety; and that, therefore, a judgment against a State must be abortive. It is true, that no express execution is given by the judicial act or the process act. But has it ever been insinuated, that a dispute between two States is not within Federal cognizance, because no execution is marked out? Or, that for a like reason, the Court, given by the confederation, could not proceed?

The Supreme Court are either vested with authority by the judicial act, to form an execution, or possess it, as incidental to their jurisdiction. By the 14th section of the judicial act, the Supreme Court, as one of the Courts of the *United States,* has power to issue writs of *scire facias, habeas corpus, and all other writs, not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.* Executions for one State against another, are writs not specially provided for by statute, and are necessary for the exercise of the jurisdiction of the Supreme Court, in a contest between States; and although, in neither the common law, nor any statute, the form of such an execution appears; yet it is agreeable to the principles and usages of law, that there should be a mode of carrying into force a jurisdiction, which is not denied. If then the Supreme Court may create a mode of execution, when a State is defeated at law by a *State,* why may not the same means be exerted, where an *individual* is successful against a State?

Again: The process-act, which dictates the modes of execution to the other Courts, is silent as to the Supreme Court; it must, therefore, be either wholly without executions, or derive them from the foregoing section of the judicial
*427 act, or adopt them, on the ground of incidental * power. The total negation of execution is obviously inadmissible; and the construction of the judicial act, which has been just insisted on, would be sufficiently efficacious. But why may not executions even spring from the will of the Supreme Court, as the writs of *fieri facias, levari facias,* and *distringas* were originally the creation of Courts?

[1] See *Bynk. c.* 3 *c.* 4.

Such an incidental authority is not of a higher tone than that of fine and imprisonment, which belongs to every Court of record, without a particular grant of it.

But what species of execution can be devised? This, though, a difficult task, is not impracticable. And if it were incumbent on me to anticipate the measures of the Court, I would suggest these outlines of conduct. First, that if the judgment be for the specific thing, it may be seized: or, secondly, if for damages, such property may be taken, as, upon the principles, and under the circumstances cited from *Bynkershoek,* would be the groundwork of jurisdiction over a foreign *Prince.* However, it is of no consequence, whether the conjectures be accurate or not; as a correct plan can doubtless be discovered.

Still we may be pressed with the final question: "What if the State is resolved to oppose the execution?" This would be an awful question indeed! He, to whose lot it should fall to solve it, would be *impelled* to invoke the god of wisdom, to illuminate his decision. I will not believe that he would recall the tremendous examples of vengeance, which in past days have been inflicted by those who claim, against those who violate, authority. I will not believe that in the wide and gloomy theatre, over which his eye should roll, he might perchance catch a distant glimpse of the Federal arm uplifted. Scenes like these are too full of horror, not to agitate, not to rack, the imagination. But at last we must settle on this result; there are many *duties,* precisely defined, which the States must perform. Let the remedy which is to be administered, if these should be disobeyed, be the remedy on the occasion, which we contemplate. The argument requires no more to be said: it surely does not require us to dwell on such painful possibilities. Rather, let me hope and pray, that not a single star in the *American* Constellation will ever suffer its lustre to be diminished by hostility against the sentence of a Court, which itself has adopted.

But, after all, although no mode of execution should be invented, why shall not the Court proceed to judgment? It is well known, that the Courts of some States have been directed to render judgment, and there stop; and that the Chancery has often tied up the hands of the common law in a like manner.

Perhaps, if a Government could be constituted without mingling at all the
*428 three orders of power, Courts should, in * strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the Executive. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character.

Combine them into one view, the letter and the spirit of the Constitution; the relation of the several States to the union of the States; the precedents from other sovereignties; the judicial act, and process act; the power of forming executions; the little previous importance of this power to that of rendering of judgment; the influence under which every State must be to maintain the general harmony; and the inference, will, I trust, be in favor of the first proposition; namely, that a State may be sued by the citizens of another State.

II. The next question is, whether an action of *assumpsit* will lie against a State? I acknowledge, that it does not follow from a State being suable in some actions, that she is liable in every action. But that of *assumpsit* is of all others most free from cavil. Is not a State capable of making a promise? Certainly; as a State is a moral person, being an assemblage of individuals, who are moral persons. Vat. 1, § 2. On this ground, treaties and other compacts, are daily concluded between nations. On this ground the *United States* and the particular States have moved during and since the war. On this ground the Constitution transmitted from the old to the new Government all the obligations of the former.

Without it every Government must stagnate. But I shall enter into this matter no further, as it is open for discussion in almost every stage of the cause.

III. I affirm in the third place, that the service of the summons on the Governor and Attorney-General, is a competent service. The service of process is solely for the purpose of notice to prepare for defence. The mode, if it be not otherwise prescribed by law, or long usage, is in the discretion of the Court; and here that discretion must operate. The defence must rest either upon the three branches of Government collectively, or one of them. But, as the judiciary are manifestly disjoined from such an office, and the legislative are only to provide funds to answer damages, the practice of considering the Executive, as the ostensible representative of a State, devolves upon it this function. In the instance of *Georgia,* her Constitution establishes the Governor as the channel of communication with the Legislature; he is bound by oath to *defend* her; and he has instituted a suit, now depending in this Court, in her behalf, against *Brailsford,*
*429 and others. It was supererogation to serve * the process on the Attorney-General; although this has satisfied even etiquette itself, by notifying the officer, who is the instrument of defence.

IV. As to the steps, proper for compelling an appearance; these too, not being dictated by law, are in the breast of the Court. I banish the comparison of States with corporations; and, therefore, search for no resemblance in them. I prefer the scheme contained in the motion; because it tempers with moderation the preliminary measures; and postpones embarrassments, at any rate, until the close of the business. It is unnecessary to spend time on this head; as the mode is to me absolutely indifferent if it be effectual, and respectful.

With this discussion, though purely legal, it will be impossible to prevent the world from blending political considerations. Some may call this an attempt to consolidate. But before such an imputation shall be pronounced, let them examine well, if the fair interpretation of the Constitution does not vindicate my opinions. Above all, let me personally assure them, that the prostration of State-rights is no object with me; but that I remain in perfect confidence, that with the power, which the people and the Legislatures of the States indirectly hold over almost every movement of the National Government, the States need not fear an assault from bold ambition, or any approaches of covered stratagem.

The Court held the case under advisement, from the 5th to the 18th of *February,* when they delivered their opinions *seriatim.*

IREDELL, *Justice.* This great cause comes before the Court, on a motion made by the Attorney-General, that an order be made by this Court to the following effect:—"That, unless the State of *Georgia* shall, after reasonable notice of "this motion, cause an appearance to be entered on behalf of the said State, on the "fourth day of next Term, or shew cause to the contrary, judgment shall be "entered for the Plaintiff, and a writ of enquiry shall be awarded." Before such an order be made, it is proper that this Court should be satisfied it hath cognizance of the suit; for, to be sure we ought not to enter a conditional judgment (which this would be) in a case where we were not fully persuaded we had authority to do so.

This is the first instance wherein the important question involved in this cause has come regularly before the Court. In the *Maryland* case it did not, because the Attorney-General of the State voluntarily appeared. We could not, therefore, without the greatest impropriety, have taken up the question suddenly.

That case has since been compromised: But, had it proceeded to trial, and a verdict been given for the Plaintiff, it would have been our duty, previous
*430 to our giving judgment, to have well * considered whether we were warranted in giving it. I had then great doubts upon my mind, and should on such a case, have proposed a discussion of the subject. Those doubts have increased since, and, after the fullest consideration, I have been able to bestow on the subject, and the most respectful attention to the able argument of the Attorney-General, I am now decidedly of opinion that no such action as this before the Court can legally be maintained.

The action is an action of *assumpsit*. The particular question then before the Court, is, will an action of *assumpsit* lie against a State? This particular question (abstracted from the general one, viz. Whether, a State can in any instance be sued?) I took the liberty to propose to the consideration of the Attorney-General, last Term. I did so because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject, until I considered the abstract question itself. The Attorney-General has spoken to it, in deference to my request, as he has been pleased to intimate, but he spoke to this particular question slightly, conceiving it to be involved in the general one; and after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed, indeed, some doubt how to prove what appeared so plain. It seemed to him (if I recollect right) to depend principally on the solution of this simple question; can a State assume? But the Attorney-General must know, that in *England,* certain judicial proceedings not inconsistent with the sovereignty, may take place against the Crown, but that an action of *assumpsit* will not lie. Yet surely the King can assume as well as a State. So can the *United States* themselves, as well as any State in the Union: Yet the Attorney-General himself has taken some pains to shew, that no action whatever is maintainable against the *United States.* I shall, therefore, confine myself, as much as possible, to the particular question before the Court, though every thing I have to say upon it will affect every kind of suit, the object of which is to compel the payment of money by a State.

The question, as I before observed, is,—will an action of *assumpsit* lie against a State? If it will, it must be in virtue of the Constitution of the *United States,* and of some law of *Congress* conformable thereto. The part of the Constitution concerning the Judicial Power, is as follows, viz: *Art. 3, sect. 2.* The Judicial Power shall extend, (1.) To all cases, in law and equity, arising under the Constitution, the laws of the *United States,* and treaties made, or which shall be made under their authority; (2.) To all cases affecting Ambassadors, or other public Ministers and Consuls; (3.) To all cases of Admiralty and Mari-
*431 time jurisdiction; (4.) To controversies to which the * *United States* shall be a party; (5.)To controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and, between a State or the citizens thereof, and foreign States, citizens or subjects. The Constitution, therefore, provides for the jurisdiction wherein a State is a party, in the following instances: 1*st.* Controversies between two or more states: 2*d.* Controversies between a State and citizens of another State: 3*d.* Controversies between a State, and foreign States, citizens, or subjects. And it also pro-

vides, that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.

The words of the general judicial act, conveying the authority of the Supreme Court under the Constitution, so far as they concern this question, are as follows: *Sect.* 13. "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party except between a State and its citizens; and except also, between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all jurisdiction of suits or proceedings against Ambassadors or other public Ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by Ambassadors, or other public Ministers, or in which a Consul or Vice-Consul shall be a party."

The Supreme Court hath, therefore, FIRST. *Exclusive* jurisdiction in every controversy of a civil nature: 1*st.* Between two or more States; 2*d.* Between a State and a foreign State. 3*d.* Where a suit or proceeding is depending against Ambassadors, other public ministers, or their domestics, or domestic servants. SECOND. *Original,* but not exclusive jurisdiction, 1*st,* between a State and citizens of other States: 2*d.* Between a State and foreign citizens or subjects: 3*d.* Where a suit is brought by Ambassadors, or other public ministers. 4*th.* Where a consul or vice-consul, is a party. The suit now before the Court (if maintainable at all) comes within the latter description, it being a suit against a State by a citizen of another State.

The Constitution is particular in expressing the *parties* who may be the objects of the jurisdiction in any of these cases, but in respect to the subject-matter upon which such jurisdiction is to be exercised, uses the word "controversies" only. The act of *Congress* more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every
*432 reasonable man will think well warranted, for * it cannot be presumed, that the general word "controversies" was intended to include any proceedings that relate to criminal cases, which in all instances that respect the same Government only, are uniformly considered of a local nature, and to be decided by its particular laws. The word "controversy" indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in *Congress* to guard against the possibility of it.

A general question of great importance here occurs. What controversy of a civil nature can be maintained against a State by an individual? The framers of the Constitution, I presume, must have meant one of two things: Either 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself), to refer to antecedent laws for the construction of the general words they use: Or, 2. To enable *Congress* in all such cases to pass all such laws, as they might deem necessary and proper to carry the purposes of this Constitution into full effect, either absolutely at their discretion, or at least in cases where prior laws were deficient for such purposes, if any such deficiency existed.

The Attorney-General has indeed suggested another construction, a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation, though it appeared to me to be the basis of the Attorney-

General's argument. His construction I take to be this—"That the moment a Supreme Court is formed, it is to exercise all the the judicial power vested in it by the Constitution, by its own authority, whether the Legislature has prescribed methods of doing so, or not." My conception of the Constitution is entirely different. I conceive, that all the Courts of the *United States* must receive, not merely their *organization* as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. There being many such, at the end of the special enumeration of the powers of *Congress* in the Constitution, is this general one: "To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the *United States,* or in any department or officer thereof." None will deny, that an act of Legislation is necessary to say, at least of what number the Judges are to consist; the *President* with the consent of the *Senate* could not
*433 nominate a number at their * discretion. The Constitution intended this article so far at least to be the subject of a Legislative act. Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority." If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the Constitution; which is a fundamental law paramount to all others, which we are not only bound to consult, but sworn to observe; and, therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference. Subject to this restriction, the whole business of organizing the Courts, and directing the methods of their proceeding where necessary, I conceive to be in the discretion of *Congress.* If it shall be found on this occasion, or on any other, that the remedies now in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate,* so far as is necessary to carry the Constitution into effect. It is *ours* only to *judge.* We have no reason, nor any more right to distrust their doing their duty, than they have to distrust that we all do ours. There is no part of the Constitution that I know of, that authorises this Court to take up any business where they left it. and, in order that the powers given in the Constitution may be in full activity, supply their omission by making *new laws* for *new cases;* or, which I take to be the same thing, applying *old principles* to *new cases* materially different from those to which they were applied before.

With regard to the Attorney-General's doctrine of incidents, that was founded entirely on the supposition of the other I have been considering. The authority contended for is certainly not one of those necessarily incident to all Courts merely as such.

If therefore, this Court is to be (as I consider it) the organ of the *Constitution and the law,* not of the *Constitution* only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an *officina brevium,* or take any other

short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner.

But the act of *Congress* has not been altogether silent upon this subject. The 14*th sect.* of the judicial act, provides in the following words: "All the beforementioned Courts of the *United States* shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by
*434 statute, which may be necessary for the exercise of their respective * jurisdictions, *and agreeable to the principles and usages of law.*" These words refer as well to the Supreme Court as to the other Courts of the *United States.* Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be *agreeable to the principles and usages of law.* This is a direction, I apprehend, we cannot supercede, because it may appear to us not sufficiently extensive. If it be not, we must wait till other remedies are provided by the same authority. From this it is plain that the Legislature did not chuse to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law already well known, and by their precision calculated to guard against that innovating spirit of Courts of justice, which the Attorney-General in another case reprobated with so much warmth, and with whose sentiments in that particular, I most cordially join. The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the State, against which the suit is brought. Or, *2d.* Principles of law common to all the States. I omit any consideration arising from the word "usages," tho' a still stronger expression. In regard to the principles of the particular laws of the State of *Georgia,* if they in any manner differed, so as to affect this question, from the principles of law, common to all the States, it might be material to enquire, whether, there would be any propriety or congruity in laying down a rule of decision which would induce this consequence, that an action would lie in the Supreme Court against some States, whose laws admitted of a compulsory remedy against their own Governments, but not against others, wherein no such remedy was admitted, or which would require, perhaps, if the principle was received, fifteen different methods of proceeding against states, all standing in the same political relation to the general Government, and none having any pretence to a distinction in its favor, or justly liable to any distinction to its prejudice. If any such difference existed in the laws of the different States, there would seem to be a propriety, in order to induce uniformity, (if a Constitutional power for that purpose exists), that *Congress* should prescribe a rule, fitted to this new case, to which no equal, uniform, and impartial mode of proceeding could otherwise be applied.

But this point, I conceive, it is unnecessary to determine, because I believe there is no doubt that neither in the State now in question, nor in any other in the *Union,* any particular Legislative mode, authorising a compulsory suit for the recovery of money against a State, was in being either when the Constitu-
*435 tion * was adopted, or at the time the judicial act was passed. Since that time, an act of Assembly for such a purpose has been passed in *Georgia.* But that surely could have no influence in the construction of an act of the Legislature of the *United States,* passed before.

The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every State in the *Union,* and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, *as it existed in England, (unaltered by any statute) at the time of the first settlement of the country.* The statutes of *England* that are in force in *America* differ perhaps in all the States; and, therefore, it is probable the common law in each, is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us, no alteration has been made by any statute, which could occasion the least material difference, or have any partial effect. No other part of the common law of *England,* it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union,* in every instance where its sovereignty has not been delegated to the *United States,* I consider to be as compleatly sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but *such as the States have surrendered to them:* Of course the part not surrendered must remain as it did before. The powers of the general Government, either of a Legislative or Executive nature, or which particularly concerns Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States: They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present Constitution. The Judicial power is of a peculiar kind. It is indeed commensurate with the ordinary Legislative and Executive powers of the general government, and the Power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Gov-
*436 ernment has a Judicial Authority in regard to such * subjects of controversy, and the Legislature of the *United States* may pass all laws necessary to give such Judicial Authority its proper effect. So far as States, under the Constitution, can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the *United States,* and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a State is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a State *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to pre-existent laws, or laws passed under the Constitution and in conformity to it.

Whatever be the true construction of the Constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from

one tribunal to another, or as authorizing the Legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption; yet it is certain that the Legislature has in fact proceeded upon the former supposition, and not upon the latter. For, besides what I noticed before as to an express reference to principles and usages of law as the guide of our proceeding, it is observable that in instances like this before the Court, this Court hath a *concurrent jurisdiction* only; the present being one of those cases where by the judicial act, this Court hath *original* but not *exclusive* jurisdiction. This Court, therefore, under that act, can exercise no authority in such instances, but such authority as from the subject matter of it may be exercised in some other Court.—There are no Courts with which such a concurrence can be suggested but the Circuit Courts, or Courts of the different States. With the former it cannot be, for admitting that the Constitution is not to have a restrictive operation, so as to confine all cases in which a State is a party exclusively to the Supreme Court (an opinion to which I am strongly inclined), yet there are no words in the definition of the powers of the Circuit Court which give a colour to an opinion, that where a suit is brought against a State by a citizen of another State, the Circuit Court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the Courts of the several States. It follows, therefore, unquestionably, I think, that looking at the act of *Congress,* which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted) we can exercise no authority in the
*437 present instance * consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed.

If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the *Union* upon the principles of the common law, which I have shewn to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of *Congress* to authorise such a one. Now I presume it will not be denied, that in every State in the *Union,* previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in *England* apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any colour, apply to the case of a claim against a State in its own Courts, where it was solely and completely sovereign in respect to such cases at least. Whether that remedy was strictly applicable or not, still I apprehend there was no other. The only remedy in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown in *England,* or could be at any period from

which the common law, as in force in *America,* could be derived, I believe is that which is called a *Petition of right.* It is stated, indeed, in *Com. Dig.* 105. That "until the time of *Edward I.* the *King* might have been sued in all actions as a common person." And some authorities are cited for that position, though it is even there stated as a doubt. But the same authority adds—"but now, none can have an action against the *King,* but one shall be put to sue to him by petition." This appears to be a quotation or abstract from *Theloall's* Digest, which is also one of the authorities quoted in the former case. And this book appears (from the law catalogue) to have been printed so long ago as the year 1579. The same doctrine appears (according to a quotation in *Blackstone's Commentaries,* 1 *vol.* 243) to be stated in *Finch's Law* 253, the first edition of which, it seems, was published in 1579. This also more fully appears in the case of the Bankers,
*438 and particularly from the celebrated argument of * *Somers,* in the time of *W. III.* for, though that case was ultimately decided against Lord *Somers's* opinion, yet the ground on which the decision was given no way invalidates the reasoning of that argument, so far as it respects the simple case of a sum of money demandable from the *King,* and not by him secured on any particular revenues. The case is reported in *Freeman, vol.* 1, *p.* 331. 5 *Mod.* 29. *Skinn.* 601. and lately very elaborately in a small pamphlet published by Mr. *Hargrave,* which contains all the reports at length, except *Skinner's,* together with the argument at large of Lord *Somers;* besides some additional matter;

The substance of the case was as follows:—*King Charles II.* having received large sums of money from bankers, on the credit of the growing produce of the revenue, for the payment of which, tallies and orders of the Exchequer were given (afterwards made transferable by statute), and the payment of these having been afterwards postponed, the *King* at length, in order to relieve the Bankers, in 1677, granted annuities to them out of the hereditary Excise, equal to six per cent interest on their several debts, but redeemable on payment of the principal. This interest was paid 'til 1683, but it then became in arrear, and continued so at the Revolution; and the suits which were commenced to enforce the payment of these arrears, were the subject of this case. The Bankers presented a petition to the Barons of the Exchequer, for the payment of the arrears of the annuities granted; to which petition the Attorney General demurred. Two points were made: First, whether the grant out of the Excise was good; second, whether a petition to the Barons of the Exchequer was a proper remedy. On the first point the whole Court agreed, that in general the *King* could alienate the revenues of the crown; but Mr. Baron *Lechmere* differed from the other Barons, by thinking that this particular revenue of the Excise, was an exception to the general rule. But all agreed, that the petition was a proper remedy. Judgment was therefore given for the petition by directing payment to the complainants at the receipt of the Exchequer. A writ of Error was brought on this judgment by the Attorney General in the Exchequer-Chamber. There all the judges who argued held the grant out of the Excise good. A majority of them, including Lord Chief Justice *Holt,* also approved of the remedy by petition to the Barons. But, Lord Chief Justice *Treby* was of opinion, that the Barons of the Exchequer were not authorised to make order for payments on the receipt of the Exchequer, and, therefore, that the remedy by petition to the Barons was inapplicable. In this opinion Lord *Somers* concurred. A doubt then arose, whether the Lord Chancellor and Lord

High Treasurer were at liberty to give judgment, according to their own
*439 * opinion, in opposition to that of a majority of the attendant Judges; in other words, whether the Judges called by the Lord Chancellor and Lord High Treasurer were to be considered as mere assistants to them, without voices. The opinion of the Judges being taken on this point, seven against three held, that the Lord Chancellor and Lord Treasurer were not concluded by the opinions of the Judges, and therefore that the Lord Keeper in the case in question, there being then no Lord Treasurer, might give judgment according to his own opinion. Lord *Somers* concurring in this idea, reversed the judgment of the Court of Exchequer. But the case was afterwards carried by error into Parliament, and there the Lords reversed the judgment of the Exchequer-Chamber, and affirmed that of the Exchequer. However, notwithstanding this final decision in favour of the Bankers and their creditors, it appears by a subsequent statute, that they were to receive only one half of their debts; the 12 & 14 *W.* 3. after appropriating certain sums out of the hereditary Excise for public uses, providing, that in lieu of the annuities granted to the Bankers and all arrears, the hereditary Excise should, after the 26th of *December* 1601, be charged with annual sums equal to an interest of three per cent, till redeemed by payment of one moiety of the principal sums. *Hargrave's case of the Bankers,* 1, 2, 3.

Upon perusing the whole of this case, these inferences naturally follow:— 1*st.* That admitting the authority of that decision in its fullest extent, yet it is an authority only in respect to such cases, where letters-patent from the crown have been granted for the payment of certain sums out of a particular revenue. *2d.* That such relief was grantable in the Exchequer, upon no other principle than that that Court had a right to direct the issues of the Exchequer as well after the money was deposited there as while (in the Exchequer language) it was *in transitu.* 3*d.* That such an authority could not have been exercised by any other Court in *Westminster-Hall,* nor by any Court that from its particular constitution had no controul over the revenues of the *Kingdom.* Lord *C. J. Holt,* and Lord *Somers* (though they differed in the main point) both agreed in that case, that the Court of *King's* bench could not send a writ to the Treasury. *Hargrave's case,* 45, 89. Consequently, no such remedy could, under any circumstances, I apprehend, be allowed in any of the *American* States, in none of which it is presumed any Court of Justice hath any express authority over the revenues of the State such as has been attributed to the Court of Exchequer in *England.*

The observations of Lord *Somers,* concerning the general remedy by petition to the *King,* have been extracted and referred to by some of the ablest law
*440 characters since; particularly by * Lord C. Baron *Comyns* in his digest. I shall, therefore, extract some of them, as he appears to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case. *Hargrave's preface to the case of the Bankers.*

After citing many authorities, Lord *Somers* proceeds thus:—

"By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent, or annuity, or other charge from the crown; whether it was a rent or annuity, originally granted by the *King;* or issuing out of lands, which by subsequent title came to be in the *King's* hands; in all cases the remedy to come at it was by petition to

the person of the *King:* and no other method can be shewn to have been practised at common law. Indeed I take it to be generally true, that in all cases where the subject is in the nature of a *Plaintiff,* to recover any thing from the *King,* his only remedy, at common law, is to sue by *Petition* to the person of the *King.* I say, where the subject comes as a *Plaintiff.* For, as I said before, when, upon a title found for the *King* by *office,* the subject comes in to traverse the *King's* title, or to shew his own right, he comes in the nature of a Defendant; and is admitted to interplead in the case with the *King* in defence of his title, which otherwise would be defeated by finding the *office.* And to shew that this was so, I would take notice of several instances. That, in cases of debts owing by the crown, the subject's remedy was by *Petition,* appears by *Aynesham's* case, Ryley, 251. which is a petition for £19. due for work done at *Carnarvon* castle. So *Ryley* 251, the executors of *John Estrateling* petition for £132. due to the testator for wages. The answer is remarkable; for there is a latitude taken, which will very well agree with the notion that is taken up in this case: *habeant bre. de liberate in Canc. thes. & camerar. de £32. in partem solutionis.* So the case of *Yerward de Galeys,* for £56. *Ryley* 414. In like manner in the same book 253. 33 *Ed. I.* several parties sue by *petition* for money and goods taken for the *King's* use; and also for wages due to them; and for debts owing to them by the *King.* The answer is, *Rex ordinavit per concilium thesaurarii & baronum de scaccario, quod satisfiet iis quam citius fieri poterit; ita quod contertos se tenebunt.* And this is an answer given to a petition presented to the *King* in *Parliament;* and therefore we have reason to conclude it to be warranted by law. They must be content, and they shall be paid, *quam citius fieri poterit.* The parties, in these cases, first go to the *King* by petition: it is by him they are sent to the Exchequer; and it is by writ under the great seal, that the Exchequer
*441 is empowered to act. Nor can * any such writ be found (unless in a very few instances, where it is mere matter of account) in which the Treasurer is not joined with the Barons. So far was it from being taken to be law at that time, that the Barons had any original power of paying the *King's* debts; or of commanding annuities, granted by the *King* or his progenitors, to be paid, when the person applied to them for such payment. But perhaps it may be objected, that it is not to be inferred, because petitions were brought in these cases, that therefore it was of necessity that the subject should pursue that course, and could take no other way. It might be reasonable to require from those who object thus, that they should produce some precedents at least, of another remedy taken. But I think there is a good answer to be given to this objection. All these petitions which I have mentioned, are after the *Stat.* 8 *Ed. I. Ryley* 442, where notice is taken *that the business of Parliament is interrupted by a multitude of petitions, which might be redressed by the Chancellor and Justices.* Wherefore it is thereby enacted, *that petitions which touch the seal shall come first to the Chancellor; those which touch the Exchequer to the Exchequer; and those which touch the Justices, or the law of the land, should come to the Justices; and if the business be so great, or fi de grace that the Chancellor, or others, cannot do them without the King, then the petitions shall be brought before the King to know his pleasure; so that no petitions come before the King and his Council, but by the hands of the Chancellor, and other chief Ministers; that the King and his Council may attend the great affairs of the King's Realm, and his*

sovereign dominions." This law being made; there is reason to conclude that all petitions brought before the *King* or *Parliament,* after this time, and answered there, were brought according to the method of this law; and were of the nature of such petitions as ought to be brought before the person of the *King.* And that petitions did lie for a chattel, as well as for a freehold, does appear, 37 *Ass. pl* ii. *Bro. Pet.* 17. If tenant by the statute merchant be ousted, he may have petition, and shall be restored. *Vide* 9 *H.* 4. 4 *Bro. Pet.* 9. 9. *H.* 6. 21. *Bro. Pet.* 2. If the subject be ousted of his term, he shall have his petition. 7. *H.* 7. *ii.* Of a chattel real a man shall have his petition of right, as of his freehold. 34. *H.* 6. 51. *Bro. Pet.* 3. A man shall have a petition of right for goods and chattels, and the *King* indorses it in the usual form. It is said indeed, 1 *H.* 7. 3 *Bro. Pet.* 19. that a petition will not lie of a chattel. And, admitting there was any doubt as to that point, in the present suit we are in the case of a freehold." Lord *Somers's* argument in *Hargrave's case of the Bankers,* 103 *to* 105.

The solitary case, noticed at the conclusion of Lord *Somer's* argument,
*442 "that a petition will not lie of a chattel," certainly * is deserving of no consideration, opposed to so many other instances mentioned, and unrecognized (as I believe it is) by any other authority either ancient or modern, whereas the contrary, it appears to me, has long been received and established law. In *Comyn's Dig.* 4 *vol.* 458. It is said expressly, "suit shall be to the *King* by petition, for *goods* as well as for *land."* He cites *Staundf. Prær.* 75. *b.* 72. *b.* for his authority, and takes no notice of any authority to the contrary. The same doctrine is also laid down with equal explicitness, and without noticing any distinction whatever, in *Blackstone's Commentaries,* 3 *vol.* 256. where he points out the petition of right as one of the common law methods of obtaining possession or restitution from the crown, either of real or *personal* property; and says expressly the petition of right "is of use where the *King* is in full possession of any hereditaments or *chattels,* and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself."

I leave out of the argument, from which I have made so long a quotation, every thing concerning the restriction on the Exchequer, so far as it concerned the case then before the Court, as Lord *Somers* (although more perhaps by weight of authority than reasoning) was over-ruled in that particular. As to all others I consider the authorities on which he relied, and his deduction from them, to be unimpeached.

Blackstone, in the first volume of his Commentaries (p. 203), speaking of demands in point of property, upon the *King,* states the general remedy thus:— "If any person has, in point of property, a just demand upon the *King,* he must petition him in his Court of Chancery, where his Chancellor will administer right, as a matter of grace, though not upon compulsion. (For which he cites *Finch L.* 255.) "And this is exactly consonant to what is laid down by the writers on natural law.—A subject, say *Puffendorf,* so long as he continues a subject, hath no way to *oblige* his *Prince* to give him his due when he refuses it; though no wise *Prince* will ever refuse to stand to a lawful contract. And if the *Prince* gives the subject leave to enter an action against him upon such contract, in his own Courts, the action itself proceeds rather upon natural equity, than upon the municipal laws. For the end of such action is not to *compel* the *Prince* to observe the contract, but to *persuade* him."

It appears, that when a petition to the person of the *King* is properly presented, the usual way is for the *King* to indorse or to underwrite, *soit droit fait al partie* (let right be done to the party); upon which, unless the Attorney-General confesses the suggestion, a commission is issued to enquire into the truth of it: after the return of which, the *King's* attorney is at liberty to
*443 * plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. If the Attorney-General confesses the suggestion there is no occasion for a commission, his admission of the truth of the facts being equally conclusive as if they had been found by a jury.—See 3 *Blackstone's Commentaries* 256. and 4 *Com. Dig.* 458. and the authorities there cited. Though the above mentioned indorsement be the usual one Lord *Somers,* in the course of his voluminous search, discovered a variety of other answers to what he considered were unquestionable petitions of right in respect to which he observes: "The truth is, the manner of answering petitions to the person of the *King* was very various; which variety did sometimes arise from the conclusion of the party's petition; sometimes from the nature of the thing; and sometimes, from favour to the person; and according as the indorsement was, the party was sent into *Chancery,* or the other Courts. If the indorsement was general, *soit droit fait al partie,* it must be delivered to the Chancellor of *England,* and then a commission was to go to find the *right* of the party; and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the *King:* but if the indorsement was special, then the proceeding was to be according to the indorsement in any other Court. This is fully explained by *Stamdford* [*Staundfort*] in his treatise of the *Prerog. c. 22.* The case *Mich.* 10 *H.* 4. *No.* 8, is full as to this matter. The *King* recovers in a *Quare impedit* by default against one who was never summoned; the party cannot have a *writ of deceit* without a petition. If then, says the book, he concludes his petition generally *"que le Roy lui face droit"* (that the *King* will cause right to be done) and the answer be general, it must go into the *Chancery,* that the right may be inquired of by commission; and, upon the inquest found, an original writ must be directed to the Justices to examine the *deceit;* otherwise, the Justices, before whom the suit was, cannot meddle: But if he conclude his petition especially, *that it may please his Highness to command his Justices to proceed to the examination,* and the indorsement be accordingly, *that* had given the Justices a jurisdiction. They might in such case have proceeded upon the petition without any commission, or any writ to be sued out; the petition and answer indorsed giving a sufficient jurisdiction to the Court to which it was directed. And as the book I have mentioned proves this, so many other authorities may be cited." He accordingly mentions many other instances, immaterial to be recited here, particularly remarking a very extraordinary difference in the case belonging to the revenue, in regard to which he said, he thought there was not an instance, to be found, where petitions were answered, *soit droit frait aux*
*444 *parties* (let right be done * to the parties): The usual reference appears to have been to the Treasurer and Barons, commanding them to do justice: Sometimes a writ under the great seal was directed to be issued to them for that purpose: Sometimes a writ from the Chancery directing payment of money immediately, without taking notice of the Barons. And other varieties appear to have taken place. See *Hargrave's case of the Bankers, p.* 73, *& seq.* But in all cases of petition of right, of whatever nature is the demand, I think

it is clear beyond all doubt, *that there must be some indorsement or order of the King himself to warrant any further proceedings.* The remedy, in the language of *Blackstone,* being a *matter of grace,* and not *on compulsion.*

In a very late case in *England,* this point was incidentally discussed. The case I refer to, is the case of *Macbeth* against *Haldimand,* reported 1*st Durnford & East* 172. The action was against the Defendant, for goods furnished by the Defendant's order *in Canada,* when the Defendant was Governor of Quebec. The defence was, that the Plaintiff was employed by the Defendant in his official capacity, and not upon his personal credit, and that the goods being therefore furnished for the use of Government, and the Defendant not having undertaken personally to pay, he was not liable. This defence was set up at the trial on the plea of the general issue, and the Jury, by Judge *Buller's* direction, found a verdict for the Defendant. Upon a motion for a new trial he reported particularly all the facts given in evidence, and said his opinion had been at the trial that the Plaintiff should be nonsuited; "but the Plaintiff's counsel appearing for their client, when he was called, he left the question to the Jury, telling them that they were bound to find for the Defendant in point of law. And upon their asking him whether, in the event of the Defendant not being liable, any other person was, he told them, that was no part of their consideration, but being willing to give them any information, he added, that he was of opinion, that if the Plaintiff's demands were just, his proper remedy was by a Petition of right to the crown. On which they found a verdict for the Defendant. The rule for granting a new trial was moved for, on the misdirection of two points. 1*st.* That the Defendant had by his own conduct made himself liable, which question should have been left to the Jury. *2dly.* That the Plaintiff had no remedy against the crown by a Petition of right, on the supposition of which the Jury had been induced to give their verdict." "Lord *Mansfield,* Chief Justice, now declared, that the Court did not feel it necessary for them to give any opinion on the second ground. His Lordship said that great difference had arisen since the revolution with respect to the expenditure of the public money. Before
*445 that period, all the public supplies were given to the *King,* who in * his individual capacity contracted for all expenses. He alone had the disposition of the public money. But since that time the supplies had been appropriated by Parliament to particular purposes, and now, whoever advances money for the public service trusts to the faith of Parliament. That according to the tenor of Lord *Somer's* argument in the Banker's case, though a Petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the Banker's case; and Parliament was afterwards obliged to provide a particular fund for the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate, if there were a recovery against the crown, application must be made to Parliament, and it would come under the head of supplies for the year." The motion was afterwards argued on the other ground (with which I have at present nothing to do) and rejected.

In the old authorities there does not appear any distinction between debts that might be contracted personally by the *King,* for his own private use, and such as he contracted in his political capacity, for the service of the kingdom. As he had however then fixed and independent revenues, upon which depended

the ordinary support of Government, as well as the expenditure for his own private occasions, probably no material distinction at that time existed, or could easily be made. A very important distinction may however perhaps now subsist between the two cases, for the reason intimated by Lord *Mansfield;* since the whole support of Government depends now on Parliamentary provisions, and, except in the case of the civil list, those for the most part annual.

Thus, it appears, that in *England,* even in case of a private debt contracted by the *King,* in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it. If the debt contracted be avowedly for the public uses of Government, it is at least doubtful whether that remedy will lie, and if it will, it remains afterwards in the power of Parliament to provide for it or not among the current supplies of the year.

Now let us consider the case of a debt due from a State. None can, I apprehend, be directly claimed but in the following instances. 1st. In case of a contract with the Legislature itself. 2d. In case of a contract with the Executive, or any other person, in consequence of an express authority from the Legislature. 3d. In case of a contract with the Executive, without any special authority. In the *first* and *second* cases, the contract is evidently made on the public faith alone. Every man must know that no suit can lie against a Legislative body. His only
*446 * dependence therefore can be, that the Legislature on principle of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in any of the Courts of the State. It never was pretended, even in the case of the crown in *England,* that if any contract was made with Parliament, or with the crown by virtue of an authority from Parliament, that a Petition to the crown would in such case lie. In the *third* case, a contract with the Governor of a State without any special authority. This case is entirely different from such a contract made with the crown in *England.* The crown there has very high prerogatives, in many instances is a kind of trustee for the public interest, in all cases represents the sovereignty of the *Kingdom, and is the only authority which can sue or be sued in any manner on behalf of the Kingdom in any Court of Justice.* A Governor of a State is a mere Executive officer; his general authority very narrowly limited by the Constitution of the State; with no undefined or disputable prerogatives; without power to effect one shilling of the public money, but as he is authorized under the Constitution, or by a particular law; having no colour to represent the sovereignty of the State, so as to bind it in any manner to its prejudice, unless specially authorised thereto. And therefore all who contract with him, do it at their own peril, and are bound to see (or take the consequence of their own indiscretion) that he has strict authority for any contract he makes. Of course such contract when so authorised will come within the description I mentioned of cases where public faith alone is the ground of relief, and the Legislative body, the only one that can afford a remedy, which, from the very nature of it must be the effect of its discretion, and not of any compulsory process. If however any such cases were similar to those which would entitle a party to relief by petition to the *King* in *England,* that Petition being only presentable to him as he is the sovereign of the *Kingdom,* so far as analogy is to take place, such Petition in a State could only be presented to the sovereign power, which surely the Governor is not. The only constituted authority to which such an application

could with any propriety be made, must undoubtedly be the Legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal; *The discretion and good faith of the Legislative body.*

There is no other part of the common law, besides that which I have considered, which can by any person be pretended in any manner, to apply to this case, but that which concerns corporations. The applicability of this, the Attorney-
*447 General, with great candour, has expressly waved. But as it may be * urged on other occasions, and as I wish to give the fullest satisfaction, I will say a few words to that doctrine. Suppose therefore, it should be objected, that the reasoning I have now used is not conclusive, because, inasmuch as a State is made subject to the judicial power of Congress, its sovereignty must not stand in the way of the proper exercise of that power, and, therefore, in all such cases (though in no other) a State can only be considered as a subordinate corporation merely. I answer: 1st. That this construction can only be allowed, at the utmost, upon the supposition that the judicial authority of the *United States,* as it respects States, cannot be effectuated, without proceeding against them in that light: a position, I by no means admit. 2d. That according to the principles I have supported in this argument, admitting that States ought to be so considered for that purpose, an act of the Legislature is necessary to give effect to such a construction, unless the old doctrine concerning corporations will naturally apply to this particular case. *3d.* That as it is evident the act of *Congress* has not made any special provision in this case, grounded on any such construction, so it is to my mind perfectly clear that we have no authority, upon any supposed analogy between the two cases, to apply the common doctrine concerning corporations, to the important case now before the Court. I take it for granted, that when any part of an antient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that antient law was formerly appropriated. Now, there are, in my opinion, the most essential differences between the old cases of corporations, to which the law intimated has reference, and the great and extraordinary case of States separately possessing, as to every thing simply relating to themselves, the fullest powers of sovereignty, and yet in some other defined particulars subject to a superior power composed out of themselves, for the common welfare of the whole. The only law concerning corporations, to which I conceive the least reference is to be had, is the common law of *England* on that subject. I need not repeat the observations I made in respect to the operation of that law in this country. The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense "a corporation." The *King,* accordingly, in *England* is called a corporation. 10 *Co. 29. b.* So also, by a very respectable author (*Sheppard,* in his Abridgement, 1 *vol.* 431). is the Parliament itself. In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed "corporations." I have, therefore, in con-
*448 tradistinction to this large and indefinite * term, used the term "subordinate corporations," meaning to refer to such only (as alone capable of the slightest application, for the purpose of the objection) whose creation and whose powers are limited by law.

The differences between such corporations, and the several States in the

Union, as relative to the general Government, are very obvious in the following particulars. 1st. A corporation is a mere creature of the King, or of parliament; very rarely of the latter; most usually of the former only. It owes its existence, its name, and its laws (except such laws as are necessarily incident to all corporations merely as such), to the authority which create it. A state does not owe its origin to the Government of the *United States,* in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: *The voluntary and deliberate choice of the people.* 2*d.* A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the *United States,* or from any other exterior authority, unless in the special instances where the general Government has power derived from the Constitution itself. 3*d.* A corporation is altogether dependent on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars to the authority of the Government of the *United States,* is in every other respect totally independent upon it. The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the *United States; that it must be of the Republican* form. I omit minuter distinctions. These are so palpable, that I never can admit that a system of law calculated for one of these cases is to be applied, *as a matter of course,* to the other, without admitting (as I conceive) that the distinct boundaries of law and Legislation may be confounded, in a manner that would make Courts arbitrary, and in effect *makers of a new law,* instead of being (as certainly they alone ought to be) *expositors of an existing one.* If still it should be insisted, that though a State cannot be considered upon the same footing as the municipal corporations I have been considering, yet, as relative to the powers of the General Government, it must be deemed in some measure dependent; admitting that to be the case (which to be sure is, so far as the necessary execution of the powers of the General Government extends) yet in whatever character this may place a State, this can
*449 only afford a reason for a new law, * calculated to effectuate the powers of the General Government in this new case. But it affords no reason whatever for the Court admitting a new action to fit a case, to which no old ones apply, when the *application* of law, not the *making* of it, is the sole province of the Court.

I have now, I think, established the following particulars.—1*st.* That the Constitution, so far as it respects the judicial authority, can only be carried into effect, by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2*d.* That *Congress* has provided no new law in regard to this case, but expressly referred us to the old. 3*d.* That there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.

From the manner in which I have viewed this subject, so different from that in which it has been contemplated by the Attorney General, it is evident, that I have not had occasion to notice many arguments offered by the Attorney General,

which certainly were very proper, as to his extended view of the case, but do not affect mine. No part of the Law of Nations can apply to this case, as I apprehend, but that part which is termed "The Conventional Law of Nations;" Nor can this any otherwise apply than as furnishing rules of interpretation, since unquestionably the people of the *United States* had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples. If upon a fair construction of the Constitution of the *United States,* the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist, upon that authority, ten thousand examples of similar powers would not warrant its assumption. So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment, that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances a com-
*450 pulsive suit against a State for the recovery of money. I * think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits, that is not for this Court to consider, unless the point in all other respects was very doubtful. Policy might then be argued from, with a view to preponderate the judgment. Upon the question before us, I have no doubt. I have therefore nothing to do with the policy. But I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the Attorney General. It is, however, a delicate topic. I pray to God, that if the Attorney General's doctrine, as to the law, be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant.

BLAIR, *Justice.* In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the *Union;* for, no State could have become a member, but by an adoption of it by the people of that State. What then do we find there requiring the submission of individual States to the judicial authority of the *United States?* This is expressly extended, among other things, to controversies between a State and

citizens of another State. Is then the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not the answer be in the affirmative? A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have
*451 no doubt, were intended; and probably the State was first named, * in respect to the dignity of a State. But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a State is plaintiff. It is, however, a sufficient answer to say, that our Constitution most certainly contemplates, in another b[r]anch of the cases enumerated, the maintaining a jurisdiction against a State, as Defendant; this is unequivocally asserted when the judicial power of the *United States* is extended to controversies between two or more States; for there, a State must, of necessity, be a Defendant. It is extended also, to controversies between a State and foreign States; and if the argument taken from the order of designation were good, it would be meant here, that this Court might have cognizance of a suit, where a State is Plaintiff, and some foreign State a Defendant, but not where a foreign State brings a suit against a State. This, however, not to mention that the instances may rarely occur, when a State may have an opportunity of suing, in the *American* Courts a foreign State, seems to lose sight of the policy which, no doubt, suggested this provision, viz. That no State in the *Union* should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature. But if a foreign State, though last named, may, nevertheless, be a Plaintiff against an individual State, how can it be said, that a controversy between a State and a citizen of another State means, from the mere force of the order of the words, only such cases where a State is Plaintiff? After describing, generally, the judicial powers of the *United States,* the Constitution goes on to speak of it distributively, and gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a *party;* but is not a State a party as well in the condition of a Defendant as in that of a Plaintiff? And is the whole force of that expression satisfied by confining its meaning to the case of a Plaintiff-State? It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where *a State is a party.*

Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that *Congress* has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual; the argument *ab in utili* may weigh much in cases depending upon the construction of doubtful Legislative acts, but can have no force, I think, against the clear and positive directions of an act of *Congress* and of the Constitution. Let us go on so far as we can; and if, at the end of the business, notwithstanding the
*452 powers given us in the 14th section * of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Govern-

ment which have higher powers; to which, however, there may be no necessity to have recourse: Is it altogether a vain expectation, that a State may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the *United States,* though not conformable to their own ideas of justice? Besides, this argument takes it for granted, that the judgment of the Court will be against the State; it possibly may be in favor of the State; and the difficulty vanishes. Should judgment be given against the Plaintiff, could it be said to be void, because extra-judicial? If the Plaintiff, grounding himself upon that notion, should renew his suit against the State, in any mode in which she may permit herself to be sued in her own Courts, would the Attorney General for the State be obliged to go again into the merits of the case, because the matter, when here, was *coram non judice?* Might he not rely upon the judgment given by this Court, in bar of the new suit? To me it seems clear that he might. And if a State may be brought before this Court, as a Defendant, I see no reason for confining the Plaintiff to proceed by way of petition; indeed there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States,* she has, in that respect, given up her right of sovereignty.

With respect to the service of the summons to appear, the manner in which it has been served seems to be as proper as any which could be devised for the purpose of giving notice of the suit, which is the end proposed by it, the Governor being the head of the Executive Department, and the Attorney General the law-officer, who generally represents the State in legal proceedings: And this mode is the less liable to exception, when it is considered, that in the suit brought in this Court, by the State of *Georgia* against *Brailsford*[1] and others, it is conceived in the name of the Governor in behalf of the State. If the opinion which I have delivered, respecting the liability of a State to be sued in this Court, should be the opinion of the Court, it will come in course to consider, what is the proper step to be taken for inducing appearance, none having been yet entered in behalf of the Defendant. A judgment by default, in the present state of the busi-
*453 ness, and writ of enquiry of damages, would * be too precipitate in any case, and too incompatible with the dignity of a State in this. Farther opportunity of appearing to defend the suit ought to be given. The conditional order moved for the last term, the consideration of which was deferred to this, seems to me to be a very proper mode; it will warn the state of the meditated consequence of a refusal to appear, and give an opportunity for more deliberate consideration. The order, I think, should be thus: 'Ordered, that unless the State of 'Georgia should, after due notice of this order, by a service thereof upon the 'Governor and Attorney General of the said State, cause an appearance to be 'entered in behalf of the State, on the 5th day of the next Term, or then shew 'cause to the contrary, judgment be then entered up against the State, and a writ 'of enquiry of damages be awarded.'

[1] *Ant.* p. [402.]

WILSON, *Justice.* This is a case of uncommon magnitude. One of the parties to it is a State certainly respectable, claiming to be *sovereign.* The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the *United States?* This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less *radical* than this—"do the people of the *United States* form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight. I shall examine it, 1*st.* By the principles of general jurisprudence. 2*d.* By the laws and practice of particular States and *Kingdoms.* From the law of nations little or no illustration of this subject can be expected. By that law the several States and Governments spread over our globe, are considered as forming a *society,* not a NATION. It has only been by a very few comprehensive minds, such as those of *Elizabeth* and the *Fourth Henry,* that this last great idea has been even contemplated. 3*dly.* and chiefly, I shall examine the important question before us, by the Constitution of the United *States,* and the legitimate result of that valuable instrument.

I. I, am, first to examine this question by the principles of general jurisprudence. What I shall say upon this head, I introduce by the observation of an original and profound writer, who, on the philosophy of *mind,* and all the sciences attendant on this *prime* one, has formed an era not less remarkable, and far more illustrious, than that formed by the justly celebrated *Bacon,* in another science, not prosecuted with less ability, but less dignified as to its object; I mean the philosophy of *matter.* Dr. *Reid,* in his excellent enquiry into the human mind, on
*454 the principles of *common sense,* speaking of the sceptical and illiberal * philosophy, which under bold, but false, pretensions to liberality, prevailed in many parts of *Europe* before he wrote, makes the following judicious remark: "The language of philosophers, with regard to the original faculties of the mind, is so adapted to the prevailing system, that it cannot fit any other; like the coat that fits the man for whom it was made, and shews him to advantage, which yet will fit very aukward upon one of a different make, although as handsome and well proportioned. It is hardly possible to make any innovation in our philosophy concerning the mind and its operations, without using new words and phrases, or giving a different meaning to those that are received." With equal propriety may this solid remark be applied to the great subject, on the principles of which the decision of this Court is to be founded. The perverted use of *genus* and *species* in *logic,* and of *impressions* and *ideas* in *metaphysics,* have never done mischief so extensive or so *practically* pernicious, as has been done by *States* and *sovereigns,* in *politics* and *jurisprudence;* in the politics and jurisprudence even of those, who wished and meant to be free. In the place of those expressions I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those, for which hitherto they have been frequently used; and one of them I shall apply to an object still more different from that, to which it has been hitherto more frequently, I may say almost universally, applied. In these purposes, and in this application, I shall be justified by example the most splendid, and by authority the most binding; the example of the most refined as well as the most free nation known to antiquity; and the authority of one of the best Constitutions known to modern times. With regard

to one of the terms—State—this authority is declared: With regard to the other sovereign—the authority is implied only: But it is equally strong: For, in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive.

To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves "SOVEREIGN" people of the *United States:* But serenely conscious of the fact, they avoided the *ostentatious declaration.*

Having thus avowed my disapprobation of the purposes, for which the terms, *State* and *sovereign,* are frequently used, and of the object, to which the application of the last of them is almost universally made; it is now proper that I should disclose the meaning, which I assign to both, and the application,
*455 * which I make of the latter. In doing this, I shall have occasion incidentally, to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his *creatures* and *servants* have first *deceived,* next *villified,* and, at last, *oppressed* their *master* and *maker.*

Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A *State;* useful and valuable as the contrivance is, is the *inferior* contrivance of *man;* and from his *native* dignity derives all its *acquired* importance. When I speak of a State, as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is *divine:* Of all *human* contrivances, it is certainly most transcendently excellent. It is concerning this contrivance that *Cicero* says so sublimely, "Nothing, which is exhibited upon our globe, is more acceptable to that divinity, which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated STATES".[1]

Let a *State* be considered as subordinate to the PEOPLE: But let every thing else be subordinate to the *State.* The *latter* part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the *end* to the *means.* As the *State* has claimed precedence of the people; so, in the same inverted course of things, the *Government* has often claimed precedence of the State; and to this perversion in the *second* degree, many of the volumes of confusion concerning sovereignty owe their existence. The *ministers,* dignified very properly by the appellation of the *magistrates,* have wished, and have succeeded in their wish, to be considered as the *sovereigns* of the State. This *second* degree of perversion is confined to the old world, and begins to diminish even there: but the *first* degree is still too prevalent, even in the several States, of which our Union is composed. By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an *artificial* person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound

[1] *Som. Sup. c. 3.*

by contracts; and for damages arising from the breach of those contracts.
*456 In all our contemplations, however, concerning this * feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are *men.*

Is the foregoing description of a State a true description? It will not be questioned, but it is. Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended, that there is. If justice is not done; if engagements are not fulfilled; is it, upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper, it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, *that he binds himself.* Upon the same principles, upon which he becomes bound *by the laws,* he becomes amenable to the *Courts of Justice,* which are formed and authorised by those laws. If one free man, an original sovereign, may do all this why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of *each,* singly, is undiminished; the dignity of all jointly, must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *State?* Surely not. Before a claim, so contrary, in its first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated. Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected: To take notice of some will be necessary to the full illustration of the present important cause. In one sense, the term *sovereign* has for its correlative, *subject.* In this sense, the term can receive no application; for it has no object in the Constitution of the *United States.* Under that Constitution there are *citizens,* but *no subjects.* "Citizens of the *United States.*"[1] "Citizens of another State." "Citizens of different States." "A State or citizen thereof."[2] The term, subject, occurs, indeed, once in the instrument: but to mark the contrast strongly, the epithet "foreign"[3] is prefixed.

In *this* sense, I presume the State of *Georgia* has no claim upon
*457 * her own citizens: In *this* sense, I am certain, she can have no claim upon the citizens of another State.

In another sense, according to some writers,[4] every State, which governs itself without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of *Georgia;* whether those citizens have done, as the individuals of *England* are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the *United States,* the citizens of *Georgia* have reserved the Supreme

[1] *Art.* 1. *s.* 2. [2] *Art.* 3. *s.* 3. [3] *Art.* 3. *s.* 3.
[4] *Vatt.* B. 1 *c. s.* 4.

Power in their own hands; and on that Supreme Power have made the State *dependent,* instead of being sovereign; these are questions, to which, as a judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the *Union,* I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is,—one constructed on this principle, that the Supreme Power resides in the body of the People. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of *Georgia,* when they acted upon the large scale of the *Union,* as a part of the "People of the *United States,*" did *not* surrender the Supreme or Sovereign Power to that State; but, *as to the purposes of the Union,* retained it to themselves. *As to the purposes of the Union,* therefore, *Georgia is* NOT a *sovereign State.* If the Judicial decision of this case forms *one* of *those* purposes; the *allegation,* that *Georgia* is a sovereign State, is unsupported by the *fact.* Whether the judicial decision of this cause is, or is not, one of those purposes, is a question which will be examined particularly in a subsequent part of my argument.

There is a third sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what, I presume, to be one of the principal objections against the jurisdiction of this Court over the State of *Georgia.* In this sense, sovereignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the *American* States. The accurate and well informed President *Henault,* in his excellent chronological abridgment of the History of *France,* tells us, that, about the end of the second race of *Kings,* a new kind of possession was acquired, under the name of *Fief.*

The Governors of Cities and Provinces usurped equally the property of
*458 land, * and the *administration of justice;* and established themselves as proprietary *Seigniors over* those places, in which they had been only civil magistrates or military officers. By this means, there was introduced into the State a new kind of authority, to which was assigned the appellation of sovereignty.[1] In process of time the feudal system was extended over *France,* and almost all the other nations of *Europe:* And every *Kingdom* became, in fact, a large *fief.* Into *England,* this system was introduced by the conqueror: and to this era we may, probably, refer the *English* maxim, that the *King* or sovereign is the fountain of Justice. But, in the case of the *King,* the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.[2] "The law, says Sir *William Blackstone,* ascribes to the *King* the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no *suit* or action can be brought against the *King,* even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power." This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in *Eng-*

[1] *Ht.* 113.

[2] 1 *Bl.,* 1 *Com.* 241. 242.

land, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it, by writers later and less known; and his doctrines have, both on the other and *this* side of the Atlantic, been implicitly and generally received by those, who neither examined their *principles* nor their *consequences.* The principle is, that all human law must be prescribed by a *superior.* This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign,* when traced to his source, must be found in the *man.*

I have now fixed, in the scale of things, the grade of a State; and have described its composure: I have considered the nature of sovereignty; and pointed its application to the proper object. I have examined the question before us, by the principles of general jurisprudence. In those principles I find nothing, which tends to evince an exemption of the State of *Georgia,* from the jurisdiction of the Court. I find every thing to have a contrary tendency.

*459 * II. I am, in the second place, to examine this question by the laws and practice of different States and *Kingdoms.* In ancient Greece, as we learn from *Isocrates,* whole nations defended their rights before crouded tribunals. Such occasions as these excited, we are told, all the powers of persuasion; and the vehemence and enthusiasm of the sentiment was gradually infused into the *Grecian* language, equally susceptible of strength and harmony. In those days, law, liberty, and refining science made their benign progress in strict and graceful union: The rude and degrading league between the bar and feudal barbarism was not yet formed.

When the laws and practice of particular States have any application to the question before us, that application will furnish what is called an argument *a fortiori;* because all the instances produced will be instances of *subjects* instituting and supporting suits against those, who were deemed *their own sovereigns.* These instances are stronger than the present one; because between the present plaintiff and defendant, no such unequal relation is alleged to exist.

Columbus achieved the discovery of that country, which, perhaps, ought to bear his name. A contract made by *Columbus* furnished the first precedent for supporting, in his discovered country, the cause of injured merit against the claims and pretensions of haughty and ungrateful power. His son *Don Diego* wasted two years in incessant, but fruitless, solicitation at the Court of *Spain,* for the rights which descended to him, in consequence of his father's original capitulation. He endeavoured, at length, to obtain, by a legal sentence, what he could not procure from the favour of an interested *Monarch.* He commenced a *suit against Ferdinand* before the Council which managed *Indian* affairs; and that *Court,* with integrity which reflects honor on their proceedings, *decided* against the *King,* and *sustained Don Diego's* claim.[1]

Other States have instituted officers to judge the proceedings of their *Kings:*

[1] *R. A.* 231.

Of this kind were the Ephori of *Sparta:* of this kind also was the mayor of the Palace, and afterwards the constable of *France.*[1]

But of all the laws and institutions relating to the present question, none is so striking as that described by the famous *Hottoman,* in his book entitled *Franco Gallia.* When the *Spaniards* of *Arragon* elect a *King,* they represent a kind of play, and introduce a personage, whom they dignify by the name of LAW, *la Justiza,* of *Arragon.* This personage they declare, by a public decree, to be greater and more powerful than their *King* and then address him in the following remarkable expressions. "We, who are of as great worth as you, and
*460 can do more * than you can do, elect you to be our *King,* upon the conditions stipulated: But between you and us there is *one* of greater authority than you."[2]

In *England,* according to Sir *William Blackstone,* no suit can be brought against the *King,* even in civil matters. So, in that *Kingdom,* is the law, at *this* time, received. But it was not always so. Under the *Saxon* Government, a very different doctrine was held to be orthodox. Under that Government, as we are informed by the Mirror of Justice, a book said, by Sir *Edward Coke,* to have been written, in part, at least, before the conquest; under that Government it was ordained, that the *King's* Court should be open to all Plaintiffs, by which, without delay, they should have remedial writs, as well against the *King* or against the *Queen,* as against any *other* of the people.[3] The law continued to be the same for some centuries after the conquest. Until the time of *Edward I.* the *King* might have been sued as a common person. The form of the process was even imperative. *"Præcipe Henrico Regi Angliæ" &c.* "Command *Henry King of England" &c.*[4] *Bracton* who wrote in the time of *Henry III.* uses these very remarkable expressions concerning the *King "In justitia recipienda, minimo de regno suo comparetur"*—"in receiving justice, he should be placed on a level with the meanest person in the *Kingdom.*[5] True it is, that now in *England* the *King* must be sued in his Courts by *Petition;* but even now, the difference is only in the *form,* not in the *thing.* The judgments or decrees of those Courts will substantially be the same upon a *precatory* as upon a *mandatory* process. In the Courts of Justice, says the very able author of the considerations on the laws of forfeiture, the *King* enjoys many privileges; yet not to deter the subject from contending with him freely.[6] The Judge of the High Court of Admiralty in *England* made, in a very late cause, the following manly and independent declaration. "In any case, where the Crown is a party, it is to be observed, that the Crown can no more withhold evidence of documents in its possession, than a private person. If the Court thinks proper to *order* the production of any public instrument; that order *must* be *obeyed.* It wants no *Insignia* of an authority derived from the Crown."[7]

"Judges ought to know, that the poorest peasant is a man, as well as the *King* himself: all men ought to obtain justice, since, in the estimation of justice, all men are *equal* whether the Prince complain of a peasant, or a peasant complain of the Prince."[8] These are the words of a *King,* of the late *Fred-*

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[1] *Sid.* 131.
[2] *Hol.* 71. *B.* 31.
[3] 4 *C. A. N.* 487.
[4] *Com.* 104.
[5] *Bract.* 107. *Com.* 104.
[6] *G. F.* 124.
[7] *Col. Jur.* 68.
[8] *War.* 343.

*461 *eric* of *Prussia.* In his Courts of Justice, that great man stood * upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty.

Thus much concerning the laws and practice of other States and *Kingdoms.* We see nothing against, but much in favour of, the jurisdiction of this Court over the State of *Georgia,* a party to this cause.

III. I am, thirdly, and chiefly, to examine the important question now before us, by the Constitution of the *United States,* and the legitimate result of that valuable instrument. Under this view, the question is naturally sub divided into two others. 1. *Could* the Constitution of the *United States* vest a jurisdiction over the State of *Georgia?* 2. *Has* that Constitution vested such jurisdiction in this Court? I have already remarked, that in the *practice,* and even in the *science* of politics, there has been frequently a strong current against the natural order of things; and an *inconsiderate* or an *interested* disposition to sacrifice the *end* to the *means.* This remark deserves a more particular illustration. Even in almost every nation which has been denominated *free,* the *state* has assumed a supercilious pre eminence above the *people,* who have *formed* it: Hence the haughty notions of *state independence, state sovereignty,* and *state supremacy.* In *despotic* Governments, the *Government* has usurped, in a similar manner, both upon the *state* and the *people:* Hence all arbitrary doctrines and pretensions concerning the Supreme, absolute, and incontrollable, power of *Government.* In *each, man* is degraded from the *prime* rank, which he ought to hold in human affairs: In the *latter,* the *state* as well as the man is degraded. Of both degradations, striking instances occur in history, in politics, and in common life. One of them is drawn from an anecdote, which is recorded concerning *Louis XIV.* who has been styled the Grand *Monarch* of *France.* This *Prince,* who diffused around him so much dazzling splendour, and so little vivifying heat, was vitiated by that inverted manner of teaching and of thinking, which forms *Kings* to be tyrants, without knowing or even suspecting that they are so. The oppression, under which he held his subjects during the whole course of his long reign, proceeded chiefly from the principles and habits of his erroneous education. By these, he had been accustomed to consider his *Kingdom* as his patrimony, and his power over his subjects as his rightful and undelegated inheritance. These sentiments were so deeply and strongly imprinted on his mind, that when one of his Ministers represented to him the miserable condition, to which those subjects were reduced, and, in the course of his representation, frequently used the word *L'Etat,* the state, the *King,* though he felt the truth and approved the substance of all that was said, yet was shocked at the *462 frequent repetition of the expression *L'Etat;* and * complained of it as an indecency offered to his person and character. And, indeed, that *Kings* should imagine themselves the *final causes,* for which *men* were made, and *societies* were formed, and *Governments* were instituted, will cease to be a matter of wonder or surprise, when we find that lawyers, and statesmen, and philosophers, have taught or favoured principles, which necessarily lead to the same conclusion. Another instance, equally strong, but still more astonishing, is drawn from the *British* Government, as described by Sir *William Blackstone* and his followers. As described by him and them, the *British* is a despotic Government. It is a Government without a people. In that Government, as so described, the

sovereignty is possessed by the Parliament: In the Parliament, therefore, the supreme and absolute authority is vested:[1] In the Parliament resides that uncontrolable and despotic power, which, in all Governments, must reside somewhere. The constituent parts of the Parliament are the *King's* Majesty, the Lords Spiritual, the Lords Temporal, and the Commons. The *King* and these three Estates together form the great corporation or body politic of the *Kingdom.* All these sentiments are found; the last expressions are found *verbatim*[2] in the commentaries upon the laws of *England.*[3] The Parliament form the great *body politic* of *England! What,* then, or *where,* are the PEOPLE? *Nothing! No where!* They are not so much as even the "baseless fabric of a vision!" From legal contemplation they totally disappear! Am I not warranted in saying, that, if this is a just description; a Government, so and justly so described, is a despotic Government? Whether this description is or is not a just one, is a question of very different import.

In the *United States,* and in the several States, which compose the *Union,* we go not so far: but still we go *one step* farther than we ought to go in this unnatural and inverted order of things. The *states,* rather than the PEOPLE, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the *United States.* Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? "The United States," instead of the "People of the United States," is the toast given. This is not *politically* correct. The toast is meant to present to view the *first* great object in the *Union:* It presents only the *second:* It presents only the *artificial* person, instead of the *natural* *463 persons, who spoke it into existence. A *State* I cheerfully * admit, is the noblest work of *Man:* But, *Man himself,* free and honest, is, I speak as to this world, the noblest work of GOD.

Concerning the prerogative of *Kings,* and concerning the sovereignty of States, much has been said and written; but little has been said and written concerning a subject much more dignified and important, the majesty of the people. The mode of expression, which I would substitute in the place of that generally used, is not only *politically,* but also (for between true liberty and true taste there is a close alliance) *classically* more correct. On the mention of *Athens,* a thousand refined and endearing associations rush at once into the memory of the *scholar,* the *philosopher,* and the *patriot.* When *Homer,* one of the most correct, as well as the oldest of human authorities, enumerates the *other* nations of *Greece,* whose forces acted at the siege of *Troy,* he arranges them under the names of their different *Kings* or *Princes:* But when he comes to the *Athenians,* he distinguishes them by the peculiar appellation of the PEOPLE[4] of *Athens.* The well known address used by *Demosthenes,* when he harangued and animated his assembled countrymen, was "O Men of *Athens.*" With the strictest propriety, therefore, *classical* and *political,* our national scene opens with the most magnificent object, which the nation could present: "The PEOPLE of the *United States*" are the first personages introduced. Who were those people? They

[1] 1 *Bl.* 46–52. 147. 160–162. [2] *Bl.* 153. [3] *Bl.* 153.
[4] *Il. I.* 2. *v.* 54. Δημοο. *Po.* 12, one of the words of which democracy is compounded.

were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its *Legislative* authority: *Executive* or *Judicial* authority it had none. In order, therefore, to form a more perfect union, *to establish justice,* to ensure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, *those people,* among whom were the people of *Georgia,* ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, *Judicial* power is vested.

The question now opens fairly to our view, *could* the *people* of those States, among whom were those of *Georgia,* bind those *States,* and *Georgia,* among the others, by the Legislative, Executive, and Judicial power so vested? If the principles, on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those *States* were the *work* of those *people;* those people, and, that I may apply the case closely, the people of
*464 *Georgia,* in particular, * could alter, as they pleased, their former work: To any given degree, they could *diminish* as well as enlarge it. *Any* or *all* of the former State-powers, they could *extinguish* or *transfer.* The inference, which necessarily results, is, that the Constitution ordained and established by *those* people; and, still closely to apply the case, in particular by the people of *Georgia, could* vest jurisdiction or judicial power over those States and over the State of *Georgia* in particular.

The next question under this head, is, Has the Constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the *United States* intended to bind those States by the *Judicial* power vested by the national Constitution, a previous enquiry will naturally be: Did those *people* intend to bind those *states* by the *Legislative* power vested by that Constitution? The articles of confederation, it is well known, did not operate upon individual *citizens;* but operated only upon *states.* This defect was remedied by the national Constitution, which, *as all allow,* has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced on the other: For they seem to think, that the present Constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. When certain laws of the States are declared to be "subject to the revision and controul of the *Congress;*"[1] it cannot, surely, be contended that the *Legislative* power of the national Government was meant to have *no* operation on the several States. The *fact,* uncontrovertibly established in *one* instance, proves the *principle* in *all other* instances, to which the facts will be found to apply. We may then infer, that the people of the *United States* intended to bind the several States, by the Legislative power of the national Government.

In order to make the discovery, at which we ultimately aim, a *second* previous enquiry will naturally be—Did the people of the *United States* intend to

[1] *Ar.* 1. *s.* 10.

bind the several States by the *Executive* power of the national Government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of *Bracton,* his maxim, I believe, has been deemed a good one—"*Supervacuum esset leges condere, nisi esset qui leges tueretur.*"[1] "It would be superfluous to *make* laws, unless those laws, when made, were to be enforced." When the laws are plain, and the application
*465 of them is uncontroverted, they are enforced immediately by the * *Executive* authority of Government. When the application of them is doubtful or intricate, the interposition of the *judicial* authority becomes necessary. The same principle, therefore, which directed us from the *first* to the *second* step, will direct us from the *second* to the *third* and *last* step of our deduction. Fair and conclusive deduction, then, evinces that the *people* of the *United States* did vest this Court with jurisdiction over the State of *Georgia.* The same truth may be deduced from the *declared objects,* and the general texture of the Constitution of the *United States.* One of its declared objects is, to form an union more perfect, than, before that time, had been formed. Before that time, the *Union* possessed Legislative, but *unenforced* Legislative power over the States. Nothing could be more natural than to *intend* that this Legislative power should be enforced by powers Executive and *Judicial.* Another declared object is, "to establish justice." This points, in a particular manner, to the *Judicial* authority. And when we view this object in conjunction with the declaration, "that no State shall pass a law impairing the obligation of contracts;" we shall probably think, that this object points, in a particular manner, to the jurisdiction of the Court over the several States. What good purpose could this Constitutional provision *secure,* if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controuling Judiciary power? We have seen, that on the principles of general jurisprudence, a State, for the breach of a contract, may be liable for damages. A third declared object is—"to ensure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between States. These consequences will be most peaceably and effectually decided, by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations; the rule between contending States; will be enforced among the several States, in the same manner as municipal law.

Whoever considers, in a combined and comprehensive view, the *general texture* of the Constitution, will be satisfied, that the people of the *United States* intended to form themselves into a nation, for *national purposes.* They instituted for *such* purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to *such* purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant
*466 to our very existence as a nation? When * so many trains of deduction, coming from different quarters, converge and unite, at last, in the same

[1] *Brac.* 107.

point we may safely conclude, as the *legitimate result* of this Constitution, that the State of *Georgia* is amenable to the jurisdiction of this Court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself. "The judicial power of the *United States* shall extend, to controversies between *two States.*"[1] *Two* States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the *United States*: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the *United States* shall extend to controversies, between a *State* and *citizens* of *another* State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? *Causes,* and not *parties* to causes, are weighed by justice, in her equal scales: On the former *solely,* her attention is fixed: To the latter, she *is,* as she is painted, blind.

I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and Kingdoms; and by the Constitution of the *United States.* From all the combined inference is; that the action lies.

CUSHING, Justice. The grand and principal question in this case is, whether a State can, by the Fœderal Constitution, be sued by an individual citizen of another State?

The point turns not upon the law of practice of *England,* although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the *United States;* and particularly upon the extent of powers given to the Fœderal Judiciary in the 2d section of the 3d article of the Constitution. It is declared that "the Judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the *United States,* or treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction;
*467 to controversies, to which the *United * States* shall be a party; to controversies between two or more states and citizens of another state; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State and citizens thereof and foreign States, citizens or subjects." The judicial power, then, is expressly extended to *"controversies between a State and citizens of another State."* When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to

[1] *Art. 3. s. 2.*

subject a State to be a Defendant, because it would affect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; *"controversies between two or more States,"* where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended?

Again what are we to do with the last clause of the section of judicial powers, viz.—*"controversies between a state, or the citizens thereof, and foreign states or citizens?"* Here again, States must be suable or liable to be made Defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the *United States* and a foreign State, as the clause expresses, one of them must be Defendant. And then, what becomes of the sovereignty of States as far as suing affects it? But although the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing as far as may be, yet ingenuity may say, that the State here may sue, but cannot be sued; but that the foreign State may be sued but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive, the reason of the thing, as well as the words of the Constitution, tend to shew that the Fœderal Judicial power extends to a suit brought by a foreign State against any one of the *United States.* One design of the general Government was for managing the great affairs of peace and war and the general defence, which were impossible to be conducted, with safety, by the States *separately.* Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity.

Thus, States at home and their citizens, and foreign States and their
*468 citizens, are put together without * distinction upon the same footing, as far as may be, as to controversies between them. So also, with respect to controversies between a State and citizens of another State (at home) comparing all the clauses together, the remedy is reciprocal; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further if a State is entitled to Justice in the Fœderal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed, the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.

But still it may be insisted, that this will reduce States to mere corporations, and take away all sovereignty. As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the *United States,* the Constitution marks the boundary of powers. Whatever power is deposited with the *Union* by the people for their own necessary security, is so far a curtailing of the power and prerogatives of

States. This is, as it were, a self-evident proposition; at least it cannot be contested. Thus, the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in *Congress;* and are a most essential abridgement of State sovereignty. Again the restrictions upon States; "No State shall enter into any *treaty, alliance, or confederation, coin money, emit bills of credit, make any thing but gold and silver a tender in payment of debts, pass any law impairing the obligations of contracts;*" these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the *Union;* and to establish some fundamental uniform principles of public justice throughout the whole *Union.* So that, I think no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the Constitution is found inconvenient in practice, in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all officers, Legislative, Executive, and Judicial, both of the States and of the *Union,* are bound by oath to support it.

*469 * One other objection has been suggested, that if a State may be sued by a citizen of another State, then the *United States* may be sued by a citizen of any of the States, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected with other reasons. When speaking of the *United States,* the Constitution says "*controversies to which the* UNITED STATES *shall be a party*" not controversies between the *United States* and any of their citizens. When speaking of States, it says, "*controversies between two or more states; between a state and citizens of another state.*" As to reasons for citizens suing a different State, which do not hold equally good for suing the *United States;* one may be, that as controversies between a State and citizens of another State, might have a tendency to involve both States in contest, and perhaps in war, a common umpire to decide such controversies, may have a tendency to prevent the mischief. That an object of this kind was had in view, by the framers of the Constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighbouring States, before the adoption of the Constitution, and some affecting the property of citizens of another State in a very different manner from that of their own citizens. But I do not think it necessary to enter fully into the question, whether the *United States* are liable to be sued by an individual citizen? In order to decide the point before us. Upon the whole, I am of opinion, that the Constitution warrants a suit against a State, by an individual citizen of another State.

A second question made in the case was, whether the particular action of *assumpsit* could lie against a State? I think *assumpsit* will lie, if any suit; provided a State is capable of contracting.

The third question respects the competency of service, which I apprehend is good and proper; the service being by summons and notifying the suit to the Governor and the Attorney General; the Governor, who is the Supreme Executive Magistrate and representative of the State, who is bound by oath to defend the State, and by the Constitution to give information to the Legislature of all im-

portant matters which concern the interest of the State; the Attorney General who is bound to defend the interests of the State in Courts of Law.

JAY, *Chief Justice.* The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State?

It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such
*470 actions. In order to ascertain the merits * of this objection, let us enquire,

1st. In what sense Georgia is a sovereign State. 2d. Whether suability is incompatible with such sovereignty. 3d. Whether the Constitution (to which *Georgia* is a party) authorises such an action against her.

Suability and *suable* are words not in common use, but they concisely and correctly convey the idea annexed to them.

1st. In determining the sense in which *Georgia* is a sovereign State, it may be useful to turn our attention to the political situation we were in, prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the *United States,* was then a part of the dominions appertaining to the crown of *Great Britain.* Every acre of land in this country was then held, mediately or immediately, by grants from that crown. All the people of this country were then, subjects of the *King* of *Great Britain,* and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the *British Empire.* They were in strict sense, fellow subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people, of the colonies, which subsisted between the people of *Gaul, Britain,* and *Spain,* while *Roman Provinces,* viz. only that affinity and social connection which result from the mere circumstance of being governed by the same *Prince;* different ideas prevailed, and gave occasion to the *Congress* of 1774 and 1775.

The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain,* the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption, to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution.
*471 It is remarkable * that in establishing it, the people exercised their own

rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the *people* of the *United States,* do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, &c.

If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, is may be useful to compare these sovereignties with those in *Europe,* that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect that some of the difficulties which embarrass the present questions, arise from inattention to differences which subsist between them.

It will be sufficient to observe briefly, that the sovereignties in *Europe,* and particularly in *England,* exist on feudal principles. That system considers the *Prince* as the *sovereign,* and the *people* as his *subjects;* it regards his *person* as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant, derives all franchises, immunities and privileges; it is easy to perceive, that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the *Prince* having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the *Prince* and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are
*472 *sovereigns without subjects* (unless the African * slaves among us may be so called) and have none to govern but *themselves;* the citizens of *America* are equal as fellow citizens, and as joint tenants in the sovereignty.

From the differences existing between fuedal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In *Europe* the sovereignty is generally ascribed to the *Prince;* here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns. Their *Princes* have personal powers, dignities, and pre-eminences, our rulers have none but *official;*

nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

2d. The second object of enquiry now presents itself, viz. whether suability is compatible with State sovereignty.

Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases, one citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually* sued, though not *personally* sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of *Delaware,* there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of *Delaware,* as on the Mayor or other Officers of the Corporation of *Philadelphia?* Will it be said, that the fifty odd thousand citizens in *Delaware* being associated under a State Government, stand in a rank so superior to the forty odd thousand of *Philadelphia,* associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?—In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in
*473 * another place, be privileged to do *justice* only as they may think proper?

Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of *Delaware* holds an office of superior rank to the Mayor of *Philadelphia,* they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the *Union* may sue another State in this Court, that is, all the people of one State may sue all the people of another State. It is plain then, that a State may be *sued,* and hence it plainly follows, that *suability* and *state sovereignty* are not incompatible. As one State may sue another State in this *Court,* it is plain that no degradation to a State is thought to accompany her appearance in this Court. It is not therefore to an appearance in this *Court* that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by *one* citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater

inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least *one half* of its force is done away by this fact, viz. that it is conceded that a State may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of *Georgia* is at this moment prosecuting an action in this Court against two citizens of *South Carolina*.[1]

The only remnant of objection therefore that remains is, that the State is not bound to appear and answer as a *Defendant* at the suit of an individual: but why it is unreasonable that she should be so bound, is hard to conjecture: That rule is said to be a bad one, which does not work both ways; the citizens of *Georgia* are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them.

Let us now proceed to enquire whether *Georgia* has not, by being a party to the national compact, consented to be suable by individual citizens of
*474 another State. This enquiry naturally * leads our attention, 1st. To the design of the Constitution. 2d. To the letter and express declaration in it.

Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general Court of appellate jurisdiction, by whom the errors of State Courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens; and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period, the *United States* had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the *United States* were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent. While *all* the States were bound to protect *each,* and the citizens of *each,* it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done *to* each, and the citizens of each; but also to cause justice to be done *by* each, and the citizens of each; and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation, that is, the people of all the *United States,* to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

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[1] *Georgia* v. *Brailsford, et al. ant.,* 1. 402.

Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended *six* objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic tranquillity. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which
*475 each of these objects bears to the others; * and to shew that they collectively comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy: on the present occasion, such disquisitions would be unseasonable, because foreign to the subject immediately under consideration.

It may be asked, what is the precise sense and latitude in which the words "to *establish justice,*" as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the 2d. section of the 3d. article, where it is ordained, that the judicial power of the *United States* shall extend to ten descriptions of cases, viz. 1st. To all cases arising under this Constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the *United States;* because as such laws constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or Courts of a part of the nation. 4th. To all cases affecting Ambassadors, or other public Ministers and Consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of Admiralty and Maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the *United States* shall be a party; because in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires, that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the *will* of either of the litigants. 8th. To controversies between a State and citizens of another State; because in case a State (that is all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national Court, than in a Court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehen-
*476 sions and * suspicions of partiality, being thereby obviated. Because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid, that the latter should be the sole Judges of the justice due to the latter; and true

Republican Government requires that free and equal citizens should have free, fair, an equal justice. 9th. To controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land, are drawn into question, neither of the two States ought to decide the controversy. 10th. To controversies between a State, or the citizens thereof and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations; or people, ought to be ascertained by, and depend on national authority. Even this cursory view of the judicial powers of the *United States,* leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the 2d section, which extends the judicial power *"to controversies between a state and citizens of another state."* It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be *Plaintiff.* The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is *remedial,* because it is to settle controversies. It is therefore, to be construed liberally. It is politic, wise, and good, that, not only the controversies, in which a State is *Plaintiff,* but also those in which a State is *Defendant,* should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: *"The judicial power of the United States shall extend to controversies between a state and citizens of another state."* If the Constitution really meant to extend these powers only to those controversies in which a State might be *Plaintiff,* to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears
*477 in * any part of the Constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no *controversy* between them. If it is a *controversy* between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it affect the definition of the word *controversy,* whether the demands which cause the dispute, are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a *controversy,* it necessarily, as to all judicial purposes, is also extended to those, between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. It would be strange, indeed, that the

joint and equal sovereigns of this country, should, in the very Constitution by which they professed *to establish justice,* so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one state, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas, in a subsequent clause; in which the Constitution ordains, that "in all cases affecting Ambassadors, other public Ministers and Consuls, and *those in which a state shall be a party,* the Supreme Court shall have original jurisdiction." Did it mean here *party-Plaintiff*? If that *only* was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word *party* being in common usage, applicable both to *Plaintiff* and *Defendant,* we cannot limit it to *one* of them in the present case. We find the Legislature of the *United States* expressing themselves in the like general and comprehensive manner; they speak in the 13th section of the judicial act, of controversies where a State is a *party,* and as they do not impliedly or expressly, apply that term to either of the litigants, in particular, we are to understand them as speaking of *both.* In the same section they distinguish the cases where Ambassadors are *Plaintiffs,* from those in which Ambassadors are *Defendants,* and make different provisions respecting those cases; and it is not unnatural to suppose, that they would in like manner have distinguished between cases where a State was Plaintiff, and where a State was Defendant, if they had intended to make any difference between them; or if they had apprehended that the Constitution had made any difference between them.

*478 * I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the Constitution which extends the judicial power to *controversies* "between a State and the citizens of another State," does also extend that power to *controversies to which the United States are a party.* Now, it may be said, if the word *party* comprehends both Plaintiff and Defendant, it follows, that the *United States* may be sued by any citizen, between whom and them there may be a *controversy.* This appears to me to be fair reasoning; but the same principles of candour which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the *United States;* but in cases of actions against the *United States,* there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the *United States,* in very different points of view.

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing between the intervals of the daily adjournments, and while my mind was occu-

pied and wearied by the business of the day, I fear it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to shew that the sentiments of the best writers on Government and the rights of men, harmonize with the principles which direct my judgment on the present question. The acts of the former Congresses, and the acts of many of the State Conventions, are replete with similar ideas; and to the honor of the *United States,* it may be observed, that in no other country are subjects of this kind better, if so well, understood. The attention and attachment of the Constitution to the equal rights of the people are discernible in almost every sentence of it; and it is to be regretted that the provision in it which we have been considering, has not in every instance, received the approbation and acquiescence which it merits. *Georgia* has in strong language advocated the
*479 cause of republican equality: and there is reason to * hope that the people of that State will yet perceive that it would not have been consistent with that equality, to have exempted the body of her citizens from that suability, which they are at this moment exercising against citizens of another State.

For my own part, I am convinced that the sense in which I understand and have explained the words "controversies between States and citizens of another State," is the true sense. The extension of the judiciary power of the *United States* to such controversies, appears to me to be *wise,* because it is *honest,* and because it is *useful.* It is *honest,* because it provides for doing justice without respect of persons, and by securing individual citizens as well as States, in their respective rights, performs the promise which every free Government makes to every free citizen, of equal justice and protection. It is *useful,* because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognises and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereigns of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of Constitutional law and government can ensure the continuance and enjoyment of them.

For the reasons before given, I am clearly of opinion, that a State is suable by citizens of another State; but lest I should be understood in a latitude beyond my meaning, I think is necessary to subjoin this caution, viz., That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and

at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

*488 * The following order was made:—By the Court—*It is ordered,* that the Plaintiff in this cause do file his declaration on or before the first day of *March* next.

Ordered, that certified copies of the said declaration be served on the Governor and Attorney General of the State of *Georgia,* on or before the first day of *June* next.

Ordered, that unless the said State shall either in due form appear, or shew cause to the contrary in this court, by the first day of next Term, judgment by default shall be entered against the said State.[1]

Grayson v. State of Virginia.

Supreme Court of the United States, 1796.

[3 *Dallas,* 320.]

Equity process against a state must be served sixty days before the return-day thereof; after which, in default of appearance, the plaintiff may proceed *ex parte.*

Such process must be served on the chief executive magistrate, and the attorney-general of the state.

Bill in Equity. The service of the *subpœna* in this case, being proved, *Lewis* moved, at the last Term, that a *Distringas* might be awarded, in order to compel the State to enter an appearance; arguing, from the analogy between a State and other bodies corporate, that this was the proper mode of proceeding. The Court, however, postponed a decision on the motion, in consequence of a doubt,—whether the remedy to compel the appearance of a State, should be furnished by the Court itself, or by the Legislature? And, in the present Term, *Lewis* argued, that the Court was competent to furnish all the necessary means for effectuating its own jurisdiction.

On the 12th of *August,* the Chief Justice [Ellsworth] delivered the following opinion.

By the Court:—After a particular examination of the powers vested in this Court, in causes of Equity, as well as in causes of Admiralty and Maritime jurisdiction, we collect a general rule for the government of our proceedings; with a discretionary authority, however, to deviate from that rule, where its application would be injurious or impracticable. The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of

[1] In *February* Term, 1794, judgment was rendered for the Plaintiff, and a Writ of Enquiry awarded. The Writ, however, was not sued out and executed; so that this cause, and all the other suits against States, were swept at once from the Records of the Court, by the amendment to the Federal Constitution, agreeably to the unanimous determination of the Judges, in *Hollingsworth et al.* v. *Virginia* (3 Dallas, 378), argued at *February* Term, 1798.

Admiralty and Equity, constituted on similar principles; but still, it is thought, that we are also authorised to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration and controul, of the Legislature.[1]

We have, therefore, agreed to make the following general Orders; and the Counsel, in the present case, will take his measures accordingly.

1. ORDERED, That when process at Common Law or in Equity, shall issue against a State, the same shall be served upon the Governor, or Chief Executive Magistrate, and the Attorney General of such State.

*321 * 2. ORDERED, That process of *subpœna* issuing out of this Court, in any suit in Equity, shall be served on the Defendant sixty days before the return day of the said process: and, further, that if the Defendant, on such service of the *subpœna,* shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte.*

Lewis then observed, that the *subpœna* in this case, had been issued on the same principles; but as the orders could only operate *in futuro,* he thought it best to withdraw his motion for a *distringas,* and to pray that an *alias subpœna* might be awarded; which was, accordingly, done.

Huger et al. v. State of South Carolina.

Supreme Court of the United States, 1797.

[3 *Dallas,* 339.]

In a suit against a state, leaving a copy of the process at the house of the governor, is a sufficient service on him.

BILL in Equity. A subpœna had been issued in this cause, agreeably to the rule; and an affidavit of the service was now read, in which it was set forth, that a copy had been delivered to the Attorney General; and that a copy had

*340 been left * at the Governor's house, where the original had, likewise, been shewn to the Secretary of the State.

*341 * IREDELL and CHASE, *Justices,* expressed some doubt, whether shewing

*342 the original to the Secretary of State, would * have been a service of the process, conformably to the rule, without leaving a copy at the Governor's house; but they agreed with the rest of THE COURT, in deeming the service, under the present circumstances, to be sufficient in strictness of construction, as well as upon principle.

The service of the subpœna being thus proved, the Complainant was entitled to proceed *ex parte;* and, accordingly, moved for and obtained Commissions, to take the examination of witnesses in several of the States.

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[1] See the Judicial Act, s. 14. The Act to regulate Processes in the Federal Courts, s. 2.

Hollingsworth v. State of Virginia.

Supreme Court of the United States, 1798.

[3 *Dallas,* 378.]

The 11th amendment to the constitution having deprived the supreme court of jurisdiction over suits against a state, by a citizen of another state, pending actions could be no further prosecuted.

An amendment to the constitution need not be presented to the president for his approval.

THE decision of the Court, in the case of *Chisholm versus Georgia, Ex'or.* (2 *Dall.* Rep. 419) produced a proposition in Congress, for amending the Constitution of the *United States,* according to the following terms:

"The Judicial power of the United States shall not be construed to extend "to any suit in law and equity, commenced or prosecuted against one of the United "States, by citizens of another state, or by citizens or subjects of any foreign "state."

The proposition being now adopted by the constitutional number of States, *Lee* Attorney-general, submitted this question to the Court—Whether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?

W. Tilghman and *Rawle,* argued in the negative, contending, that the jurisdiction of the Court was unimpaired, in relation to all suits instituted, previously to the adoption of the amendment. They premised, that it would be a great hardship, that persons legally suing, should be deprived of a right of action, or be condemned to the payment of costs, by an amendment of the Constitution *ex post facto;* 4 *Bac. Abr.* 636. 7. *pl.* 5. And that the jurisdiction being before regularly established, the amendment notwithstanding the words *"shall not be construed," &c.* must be considered, in fact, as introductory of a new system of judi-
*379 cial authority. There are, however, two objections to be * discussed.

The amendment has not been proposed in the form prescribed by the Constitution, and, therefore, it is void. Upon an inspection of the original roll, it appears that the amendment was never submitted to the President for his approbation. The Constitution declares that "every order, resolution or "vote, to which the concurrence of the Senate and House of Representatives may "be necessary (except on a question of adjournment) shall be presented to the "President of the *United States;* and before the same shall take effect, shall be "approved by him, or being disapproved by him, shall be repassed by two thirds "of the Senate and House of Representatives, &c." *Art.* 1, *s.* 7. Now, the Constitution likewise declares, that the concurrence of both Houses shall be necessary to a proposition for amendments. *Art.* 5. And it is no answer to the objection, to observe, that as two thirds of both Houses are required to originate the proposition, it would be nugatory to return it with the President's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proportion. The concurrence of the President is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both Houses of Congress.

2d. The second objection arises from the terms of the amendment itself. The

words "commenced or prosecuted," are properly in the past time; but, it is clear, that they ought not to be so grammatically restricted; for, then, a citizen need only discontinue his present suit, and commence another, in order to give the court cognizance of the cause. To avoid this evident absurdity, the words must be construed to apply only to suits *to be* "commenced and prosecuted." The spirit of the constitution is opposed to every thing in the nature of an *ex post facto* law, or retrospective regulation. No *ex post facto* law can be passed by Congress. *Const. Art.* 1. *s.* 9. No. *ex post facto* law can be passed by the Legislature of any individual State. *Ibid. s.* 10. It is true, that an amendment to the Constitution cannot be controuled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and, therefore, they ought to be so construed, as to conform to the general principle of the Constitution.[1] In
*380 * 4 *Bac. Abr.* 650. *pl.* 64. it is stated, that "a statute shall never have an equitable construction, in order to overthrow an estate;" but, if the opposite doctrine prevails, it is obvious, that many vested rights will be affected, many estates will be overthrown. For instance; Georgia has made and unmade grants of land, and to compel a resort to her courts, is, in effect, overthrowing the estate of the grantees. So, in the same book (*p.* 652, *pl.* 91. 92.) it is said, that "a statute ought to be so construed, that no man, who is innocent, be punished or endamaged;" and "no statute shall be construed in such manner, as to be inconvenient or against reason:" whereas, the proposed construction of the amendment would be highly injurious to innocent persons; and, driving them from the jurisdiction of this court saddled with costs, is against every principle of justice, reason, and convenience. Presuming, then, that there will be a disposition to support any rational exposition, which avoids such mischievous consequences, it is to be observed, that the words "commenced and prosecuted" are synonymous. There was no necessity for using the word "commenced," as it is implied and included in the word "prosecuted;" and admitting this glossary, the amendment will only affect the future jurisdiction of the court. It may be said, however, that the word "commenced" is used in relation to future suits, and that the word "prosecuted" is applied to suits previously instituted. But it will be sufficient to answer, in favor of the benign construction, for which the Plaintiffs contend, that the word "commencing" may, on this ground, be confined to actions originally instituted here, and the word "prosecuted" to suits brought hither by writ of error, or appeal. For, it is to be shewn, that a state may be sued originally, and yet not in the Supreme Court, though the Supreme Court will have an appellate jurisdiction; as where laws of the state authorize such suits in her own courts, and there is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. 1 *Vol. p.* 58, *s.* 13. *p.* 63. *s.* 25. Upon the whole, the words of the amendment are ambiguous and obscure; but as they are susceptible of an interpretation, which will prevent the mischief of an *ex post facto* Constitution (worse than an *ex post facto* law, inasmuch as it is not so easily rescinded, or repealed) that interpretation ought to be preferred.

Lee, Attorney General. The case before the court, is that of a suit against a state, in which the Defendant has never entered an appearance; but the amend-

[1] CHASE, *Justice.* The words "commenced and prosecuted," standing alone, would embrace cases both past and future.

W. Tilghman. But if the court can construe them, so as to confine their operation to future cases, they will do it, in order to avoid the effect of an *ex post facto* law, which is evidently contrary to the spirit of the constitution.

ment is equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment. An
*381 amendment * of the constitution, and the repeal of a law, are not, manifestly, on the same footing: Nor can an explanatory law be expounded by foreign matter. The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised, else where. The policy and rules, which in relation to ordinary acts of legislation, declare that no *ex post facto* law shall be passed, do not apply to the formation, or amendment, of a constitution. The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restraint on themselves. They could have said, by an amendment to the constitution, that no judicial authority should be exercised, in any case, under the *United States,* and, if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general grounds, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part, of the judicial authority of the *United States*? Two objections are made: 1st, That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments, that have been adopted?[1] And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress. 2d, That the amendment itself only applies to future suits. But whatever force there may be in the rules for construing statutes, they cannot be applied to the present case. It was the policy of the people, to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states; and the words being so extended as to support that policy, will equally apply to the past and to the future. A law, however, cannot be denominated retrospective, or *ex post facto,* which merely changes the remedy, but does not affect the right: In all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the union; and if any part of the judicial act is in opposition to it, that part must be expunged. There can be no
*382 amendment of the constitution, indeed, which may * not, in some respect, be called *ex post facto;* but the moment it is adopted, the power that it gives, or takes away, begins to operate, or ceases to exist.

THE COURT, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects, of any foreign state.

[1] CHASE, *Justice.* There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.

Fowler et al. v. Lindsey et al.
Fowler et al. v. Miller.

Supreme Court of the United States, 1799.

[3 *Dallas,* 411.]

A *certiorari* does not lie to remove a cause, on account of the absence of jurisdiction in the court in which it is pending.

The fact that the land which is the subject of controversy was granted by, and is claimed under a state, does not make the state a party to the suit; nor does an issue, whether it be within the limits of a state.

A RULE had been originally obtained in these actions (which were depending in the Circuit Court for the District of *Connecticut*) at the instance of the Defendants, requiring the Plaintiff to shew cause why a *Venire* should not be awarded to summon a Jury from some District, other than that of *Connecticut* or *New-York;* but it was changed, by consent, into a rule to shew cause why the actions should not be removed by *Certiorari* into the Supreme Court as exclusively belonging to that jurisdiction. On shewing cause, it appeared, that suits, in the nature of Ejectments, had been instituted in the Circuit Court for the District of *Connecticut,* to recover a tract of land, being part of the *Connecticut Gore* which that state had granted to *Andrew Ward* and *Jeremiah Hasley,* and by whom it had been conveyed to the Plaintiffs. The Defendants pleaded that they were inhabitants of the State of *New-York;* that the premises, for which the suits were brought, lay in the County of *Steuben,* in the state of *New-York;* and that the Circuit Court for the District of New-York, or the Courts of the State, and no other Court, could take cognizance of the actions. The plaintiffs replied, that the premises lay in the State of *Connecticut;* and, issue being joined, a *venire* was awarded. On the return, however, the defendants challenged the array, because the Marshall of the District of *Connecticut,* a resident and citizen of that State, had arrayed the Jury by his deputy, who was also a citizen of Connecticut, and interested as a purchaser, or claimant, in the *Connecticut Gore,* under the same title as the Plaintiff. That Plaintiffs prayed oyer of the record and return, averred that the deputy Marshall was not interested in the question in issue, and demurred to the challenge for being double, and contrary to the record, which does not shew that the Jury was returned by the deputy Marshall. The Defendants joined in demurrer. *The Court* overruled the challenge, as it respected the general interest of the Marshall and his deputy, owing to their being citizens of *Connecticut;* but allowed it,
*412 and quashed the array, on account of the particular * interest of the deputy, he being interested in the same tract of land, under colour of the same title as the Plaintiffs.

The amended rule was argued, by *Lewis* and *Hoffman* (the Attorney-General of New-York,) in favor of its being made absolute, and by *Hillhouse* of *Connecticut* against it, on the question, whether the suits ought to be considered as virtually depending between the States of *Connecticut* and *New-York?* And the following opinions were delivered by the Court, THE CHIEF JUSTICE, however, declining, on account of the interest of *Connecticut,* to take any part in the

decision, and CHASE and IREDELL, *Justices,* being absent on account of indisposition.

WASHINGTON, *Justice.* The first question that occurs, from the arguments on the present occasion, respects the nature of the rights, that are contested in the suits, depending in the Circuit Court. Without entering into a critical examination of the Constitution and laws, in relation to the jurisdiction of the Supreme Court, I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case, in which a State is either nominally, or substantially, the party. It is not sufficient, that a State may be consequentially affected; for, in such case (as where the grants of different States are brought into litigation) the Circuit Court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions, that have been founded on the remote interest of the State, in making retribution to her grantees, upon the event of an eviction.

It is not contended that the States are nominally the parties; nor do I think that they can be regarded as substantially, the parties, to the suits: nay, it appears to me, that they are not even interested, or affected. They have a right either to the soil, or to the jurisdiction. If they have the right of soil, they may contest it, at any time, in this Court, notwithstanding a decision in the present suits; and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision, as to the former object, between individual Citizens, can never affect the right of the State, as to the later object: it is *res inter alios acta.* For, suppose the Jury in some cases should find in favor of the title under *New-York;* and, in others, they should find in favor of the title under *Connecticut,* how would this decide the right of jurisdiction? And on what principle can private citizens, in the litigation of their private claims, be competent to investigate, determine, and fix, the important rights of sovereignty?

*413 * The question of jurisdiction remaining, therefore, unaffected by the proceedings in these suits, is there no other mode by which it may be tried? I will not say, that a State could sue at law for such an incorporeal right, as that of sovereignty and jurisdiction; but even if a Court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a Court of Equity. The State of *New-York* might, I think, file a bill against the State of *Connecticut,* praying to be quieted as to the boundaries of the disputed territory; and this Court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. There being no redress at law, would be a sufficient reason for the interposition of the equitable powers of the Court; since, it is monstrous, to talk of existing rights, without applying correspondent remedies.

But as it is proposed to remove the suits under consideration from the Circuit Court into this Court, by writs of *certiorari,* I ask whether it has ever happened, in the course of judicial proceedings, that a *certiorari* has issued from a superior, to an inferior, court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur. If the State is really a party to the suit in the inferior Court, a plea to the jurisdiction may be there put in; or, perhaps, without such a plea, this Court would reverse the judgment on a writ of error: And if the state is not a party, there is no pretence for the removal.

A *certiorari,* however, can only issue, as original process, to remove a cause, and change the *venue,* when the Superior Court is satisfied, that a fair and impartial trial will not otherwise be obtained; and it is sometimes used, as auxiliary process, where, for instance, diminution of the record is alleged, on a writ of error: But in such cases, the Superior Court must have jurisdiction of the controversy. And as it does not appear to me, that this Court has exclusive, or original, jurisdiction of the suits in question, I am of opinion that the rule must be discharged.

PATERSON, *Justice.* The rule to shew cause, why a *venire* should not be awarded to summon a jury from some district, other than that of *Connecticut* or *New-York,* cannot be supported. It has, indeed, been abandoned. The argument proceeds on the ground of removing the cause into this Court, as having exclusive jurisdiction of it, because it is a controversy between States. The constitution of the *United States,* and the act of Congress, although the phraseology be somewhat different, may be construed in perfect conformity with each other.

The present is a controversy between individuals respecting their right of
*414 title to a particular tract of land, and * cannot be extended to third parties or states. Its decision will not affect the State of *Connecticut* or *New-York;* because neither of them is before the Court, nor is it possible to bring either of them, as a party, before the Court, in the present action. The state, as such, is not before us. Besides, if the cause should be removed into this Court, it would answer no purpose; for I am not able to discern by what authority, we could change the *venue,* or direct a jury to be drawn from another District. As to this particular there is no devolution of power either by the constitution or law. The authority must be given;—we cannot usurp or take it.

If the point of jurisdiction be raised by the pleadings, the Circuit Court is competent to its decision; and, therefore, the cause cannot be removed into this Court previously to such decision. To remove a cause from one Court to another, on the allegation of the want of jurisdiction, is a novelty in judicial proceedings. Would not the *certiorari* to remove, be an admission of the jurisdiction below?

Neither of the motions is within the letter or spirit of the constitution or law.

How far a suit may, with effect, be instituted in this Court to decide the right of jurisdiction between two States, abstractedly from the right of soil, it is not necessary to determine. The question is a great one; but not before us.

I regret the incompetency of this Court to give the aid prayed for. No prejudice or passion, whether of a state or personal nature, should insinuate itself in the administration of justice. Jurymen, especially, should be above all prejudice, all passion, and all interest in the matter to be determined. But it is the duty of judges to declare, and not to make the law.

CUSHING, *Justice.* These motions are to be determined, rather by the constitution and the laws made under it, than by any remote analogies drawn from English practice.

Both by the constitution and the judicial act, the Supreme Court has original jurisdiction, where a State is a party. In this case, the State does not appear to be a party, by any thing on the record. It is a controversy or suit between private citizens only; an action of ejectment, in which the defendant pleads to the juris-

diction, that the land lies in the State of *New-York,* and issue is taken on that fact.

Whether the land lies in *New-York* or *Connecticut,* does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend on very different words, charters, and foundations. A decision of that issue, can only determine the controversy as between the *415 private citizens, who are parties to the suit, and the event only * give the land to the Plaintiff or Defendant; but could have no controuling influence over the line of jurisdiction; with respect to which, if either State has a contest with the other, or with individuals, the State has its remedy, I suppose, under the constitution and the laws, by proper application, but not in this way; for she is not a party to the suit.

If an individual will put the event of his cause in a plea of this kind, on a fact, which it not essential to his right; I cannot think, it can prejudice the right of jurisdiction appertaining to a State.

I agree with the rest of the Court, that neither of the motions can be granted.

By the Court: Let the rules be discharged.

United States v. Judge Peters.

Supreme Court of the United States, 1809.

[5 *Cranch,* 115.]

The legislature of a state cannot annul the judgments, nor determine the jurisdiction, of the courts of the United States.

The court of appeals in prize causes, erected by the continental congress, had power to revise and correct the sentences of the state courts of admiralty.

Although the *claims* of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

At the last term, Gideon Olmstead, in behalf of himself and Artimus White, Aquilla Rumsdale, and David Clark, moved the court for a *mandamus,*[1] to be directed to the Honourable Richard Peters, Judge of the District Court of the United States for the Pennsylvania district, commanding him to order and direct an attachment, or other proper process, to issue to enforce obedience to the sen-

[1] On Saturday, March 5th, 1808, upon the affidavit of Olmstead, a rule was granted that Judge Peters should show cause by the next Saturday, why a mandamus should not issue. On Saturday, March 12th, a letter was received by one of the counsel for Olmstead, from Judge Peters, acknowledging service of the rule; and stating that an act of the legislature of Pennsylvania had commanded the governor of that state to call out an armed force to prevent the execution of any process to enforce the performance of the sentence. That such being the state of things he should not direct process to issue unless he should be so ordered by this court; whereupon a *mandamus nisi* was granted, returnable at the next term.

tence of the said district court, in a civil cause of admiralty and maritime jurisdiction, in which the said Gideon Olmstead and others were libellants, and Elizabeth Sergeant and Esther Waters were respondents. This motion was made upon a suggestion, supported by affidavit, that a copy of the sentence had been served upon the respondents, which they refused to obey; and that application had been made to the judge for an attachment, which he had refused to grant;

Whereupon, a mandamus nisi was granted returnable to this term. . . .

*135 * February 20th, 1809. MARSHALL, Ch. J. delivered the opinion of the court as follows:

With great attention, and with serious concern, the court has considered the return made by the judge for the district of Pennsylvania to the *mandamus* directing him to exercise the sentence pronounced by him in the case of *Gideon Olmstead and others* v. *Rittenhouse's Executrixes,* or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the state of Pennsylvania, the money which had been decreed to Gideon Olmstead and others; and which was in the hands of the executrixes of David Rittenhouse; and, in default of payment, to direct the attorney-general to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means

*136 he * may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever, issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great

*137 Britain, Gideon Olmstead and * others, citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New-York, and laden with a cargo for the use of the British army in that place. On the voyage they seized

the vessel, confined the captain, and sailed for Egg Harbour. In sight of that place, the Active was captured by the *Convention,* an armed ship belonging to the state of Pennsylvania, brought into port, libelled and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress, by which tribunal the sentence of condemnation was reversed, the Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty, commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by congress, as an appellate court, but denied its power to control the verdict of a jury which had been rendered in favour of the captors, the officers and the crew of the *Convention;* and therefore refused obedience to the mandate: but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals, for an injunction to prohibit the marshal from paying the money, arising from the sales, into the court of admiralty; which was awarded, and served upon him: in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

*138 On the 1st of May, 1799, George Ross, the judge * of the court of admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.* in loan-office certificates; which was the proportion of the prize money to which that state would have been entitled, had the sentence of the court of admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the court of appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th of November 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the treasury, as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives; against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the court of appeals.

*139 * While this suit was depending, the state of Pennsylvania forbore to

assert its title, and, in January, 1803, the court decreed in favour of the libellants; soon after which, the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction, in this cause, by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property in possession of an individual, must arrest the proceed-
*140 ings of the court, and prevent their * looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation it has been long since decided, that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states, in prize causes. That question, therefore, is at rest. Consequently, the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the state of Pennsylvania in the *Active* and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosesoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge, of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for

interest, were drawn by David Rittenhouse, and preserved with the original
*141 certificates. When funded as * part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the state of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property, which represented the Active and her cargo, was in possession, not of the state of Pennsylvania, but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. *A peremptory mandamus must be awarded.*

Bank of the United States v. Planters' Bank of Georgia.

Supreme Court of the United States, 1824.

[9 *Wheaton,* 904.]

The Circuit Courts of the United States have jurisdiction of suits brought by the Bank of the United States against another Bank, incorporated under a law of a state, and of which the State itself is a stockholder, together with private individuals, who are citizens of the same State with some of the stockholders of the Bank of the United States. . . .

The circumstance that a State is a member of a private corporation, will not give this Court original jurisdiction of suits where the corporation is a party, nor oust the Circuit Courts of the jurisdiction vested in them by law.

March 11th, 1824. THIS cause was brought up on a certificate of a division of opinion between the Judges of the Circuit Court of Georgia, upon the questions arising in it, and was argued by the same counsel with the preceding case of *Osborn* v. *The Bank of the United States.*

March 20. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In this case, the petition of the plaintiffs, which, according to the practice of the State of Georgia, is substituted for a declaration, is founded on promissory notes, payable to a person named in the note, "or bearer," and states, that the

*905 notes were * "duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," &c.

The Planters' Bank pleads to the jurisdiction of the Court, and alleges, that it is a corporation, of which the State of Georgia, and certain individuals, who are citizens of the same State with some of the plaintiffs, are members. The plea also alleges, that the persons to whom the notes mentioned in the petition were made payable, were citizens of the State of Georgia, and, therefore, incapable of suing the said Bank in a Circuit Court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that Court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurer, the Judges were divided on two questions:

1. Whether the averments in the declaration are sufficient in law to give this Court jurisdiction of the cause?

2. Whether, on the pleadings in the same, the plaintiffs are entitled to judgment?

The first question was fully considered by the Court in the case of *Osborne* v. *The Bank of the United States,* and it is unnecessary to repeat the reasoning used in that case. We are opinion, that the averments in the declaration are sufficient to give the Court jurisdiction of the cause.

*906 * The second point is understood to involve two questions:

1. Does the circumstance that the State is a corporator, bring this cause within the clause in the constitution which gives jurisdiction to the Supreme Court where a State is a party, or bring it within the 11th amendment?

2. Does the fact that the note is made payable to a citizen of the State of Georgia, or bearer, oust the jurisdiction of the Court?

1. Is the State of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this Court have entertained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the State must be plaintiff or defendant as a State, and must, as a State, be a party on the record. A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator. The State is not a party, that is, an entire party, in the cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show, that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction it is not within the amend-

*907 ment. * This is not, we think, a case in which the character of the defendant gives jurisdiction to the Court. If it did the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal Courts, but because the plaintiff has a right to sue any defendant in that Court, who is not withdrawn from its jurisdiction by the constitution, or by law. The suit is against a corporation, and the judgment

is to be satisfied by the property of the corporation, not by that of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the
*908 transactions of the Bank, and waives all * the privileges of that character.

As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal Courts, by the circumstance that that State is a corporator. . . .

We think, then, that the charter gives to the Bank a right to sue in the Circuit Courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favour of the plaintiff.

Johnson, Justice. (*Dissenting*). . . .

Sundry African Slaves, The Governor of the State of Georgia, Claimant, Appellant, v. Juan Madrazo.

The Governor of the State of Georgia, Appellant, v. Sundry African Slaves, Juan Madrazo, Claimant.

Supreme Court of the United States, 1828.

[1 *Peters,* 110.]

In the District Court of the United States for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state,

for an alleged illegal importation; process was issued against the slaves, but was not served. The case was taken by appeal to the Circuit Court, and the governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the Circuit Court, &c. Held, that such a stipulation could not give jurisdiction in the case to the Circuit Court as process could not issue legally from the Circuit Court against the Africans; because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess. p. 121.

"It may be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." p. 122.

The libel and claim exhibited a demand for money actually in the treasury of the State of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise. Held, that the Courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendment to the Constitution of the United States. p. 123.

In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record. p. 124.

*118 * Mr. Chief Justice Marshall delivered the opinion of the Court.

Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the island of Cuba, engaged in the slave trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sail under the flag of one of the governments of Spanish America, and carried into Amelia Island; where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William *119 Bowen, and were conducted into the Creek nation; * within the limits of the state of Georgia, where they were seized by M'Queen M'Intosh, a revenue officer, at Darien, in Georgia, early in January, 1818, under the Act of 1807; which prohibits the importation or bringing into the United States, of any negro, mulatto, or person of colour. This Act annuls the title of the importer, or any person, claiming under him, to such negro, mulatto, or person of colour, and declares that such persons "shall remain subject to any regulation, not contravening the provisions of this Act, which the legislatures of the several states or territories, at any time hereafter, may make for disposing of such negro, mulatto, or person of colour."

In December, 1817, the legislature of Georgia passed an Act, which empowered the governor to appoint some fit and proper person to proceed to all such ports and places within this state, as have, or may hereafter hold any negroes, mulattoes, or persons of colour, as have been, or may hereafter be seized or condemned under the above recited Act of Congress, and who may be subject to the control of this state; and the person so appointed shall have full power and authority to receive all such negross, mulattoes, or persons of colour, and to convey the same to Milledgevile, and place them under the immediate control of the executive of this state.

The second section authorizes the governor to sell such negroes, mulattoes, or persons of colour, in such manner as he may think most advantageous to the state.

The third directs that they may be delivered up to the Colonization Society, on certain conditions therein expressed; provided, the application be made before the sale.

Under this Act, the Africans brought in by William Bowen, were delivered up to the governor of Georgia, who sold the greater number of them, and paid the proceeds, amounting to 38,000 dollars, into the treasury of the state. The Colonization Society applied for those remaining unsold, amounting to rather more than twenty, and offered to comply with the conditions prescribed in the Act of December 1817.

In May, 1820, the governor of Georgia filed an information in the District Court of Georgia, stating the violation of the Act of Congress, that the Africans were placed under the immediate control of the executive of the state, where they awaited the decree of the Court. He states the application made on the part of the Colonization Society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the Court.

In November 1820, William Bowen filed his claim to the said Africans,
*120 alleging that they were his property—that they * had not been brought into the United States in violation of the Act of Congress; but were seized while passing through the Creek nation, on their way to West Florida.

In February 1821, Juan Madrazo filed his libel, alleging that the Africans were his property—that on the return voyage from Africa, they were captured by the privateer Successor, commanded by an American, and fitted out in an American port—that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States—brought into the limits of the district of Georgia, and delivered over to the government of that state, in pursuance of an Act of the General Assembly, carrying into effect an Act of Congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to 38,000 dollars, or more, paid into the treasury of the state; and that the residue, amounting to twenty-seven or thirty, remain under the control of the governor.

The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the governor of Georgia; and that the governor and all others concerned, should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold, paid over to him.

Upon this libel a monition was issued to the governor of Georgia, who appeared and filed a claim on behalf of the state; in which he says, that the slaves were brought into the state, in violation of the Act of Congress, and that they were taken into the possession of the executive of the state, in pursuance of the Act of the state legislature, enacted to carry the Act of Congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the treasury, where they have become a part of the funds of the state, not subject to his control, nor to the control of the treasurer. That the residue of the said slaves, who remain unsold, have been demanded under the law, by the Colonization Society.

Process was also issued against the Africans, but was not executed. The

two causes came on together, and the District Court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal, to the governor of the state, and that the proceeds of those sold, should remain in the treasury.

Both Bowen and Madrazo appealed to the Circuit Court.

*121 At the hearing in the Circuit Court, the sentence, dismissing * the claim of Bowen, was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made, that the slaves remaining unsold, should be delivered to him; on his giving security to transport them out of the United States—and farther, that the proceeds of those which were sold, should be paid to him. From this decree, the governor of Georgia and William Bowen have appealed to this Court.

A question, preliminary to the examination of the title to the Africans, which were the subject of these suits, and to the proceeds of those which were sold, has been made by the counsel for the state of Georgia. He contends, that this is essentially, and in form, a suit against the state of Georgia; and therefore was not cognizable in the District Court of the United States.

The process which issued from the Court of Admiralty not having been executed, the *res* was never in possession of that Court. The libel of Madrazo, therefore, was not a proceeding against the thing, but a proceeding against the person for the thing. This appeal carried the cause into the Circuit Court, as it existed in the District Court, when the decree was pronounced. It was a libel, demanding, personally, from the governor of Georgia, the Africans remaining unsold, and the proceeds of those that were sold, which proceeds had been paid into the treasury.

Pending this appeal, the governor filed a paper in the nature of a stipulation, consenting to hold the Africans claimed by the libel of Madrazo, subject to the decree of the Circuit Court; if it should be determined that the claim in the Circuit Court had priority to sundry executions, levied on them by the sheriff of Baldwin county. Had this paper been filed in the District Court, it would have been a substitute for the Africans themselves, and would, according to the course of the admiralty, have enabled that Court to proceed in like manner as if its process had been served upon them. The libel would then have been *in rem.* Could this paper, when filed in the Circuit Court, produce the same effect on the cause?

We think, it could not.

The paper in the nature of a stipulation, is a mere substitute for the process of the Court; and cannot, we think, be resorted to, where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty; which the Circuit Court does not possess.

This cause therefore remained in its character a libel against the person of the governor of Georgia, for the Africans in his possession as governor,

*122 and for the proceeds, in the treasury, of * those which had been sold. Could the District Court exercise jurisdiction in such a cause?

Previous to the adoption of the 11th amendment of the Constitution, it was determined that the judicial power of the United States, extended to a case in which a state was a party defendant. This principle was settled in the case of

Chisholm *vs.* Georgia, 2 *Dal.* 419. In that case, the state appears to have been nominally a party on the record. In the case of Hollingsworth *vs.* Virginia, also in 3 *Dal.* 378, the state was nominally a party on the record. In the case of Georgia *vs.* Brailsford, 2 *Dal.* 402, the bill was filed by his excellency Edward Telfair, Esq. Governor and Commander in Chief, in and over the state of Georgia, in behalf of the said Estate. No objection was made to the jurisdiction of the Court, and the case was considered as one in which the Supreme Court had original jurisdiction, because a state was a party. In the case of New York *vs.* Connecticut, 4 *Dal.* 3, both the states were nominally parties on the record. No question was raised in any of the cases respecting the style in which a state should sue or be sued; and the presumption is that the actions were admitted to be properly brought. In the case of Georgia *vs.* Brailsford, the action is not in the name of the state, but it is brought by its chief magistrate in behalf of the state. The bill itself avows, that the state is the actor, by its governor.

There is, however, no case in which a state has been sued without making it nominally a defendant.

Fowler et al. *vs.* Lindsey et al., 3 *Dal.* 411, was a case in which an attempt was made to restrain proceedings in a cause depending in a Circuit Court on the allegation that a controversy respecting soil and jurisdiction of two states, had occurred in it.

The Court determined that a state, not being a party on the record, nor directly interested, the Circuit Court ought to proceed in it. In the United States *vs.* Peters, the Court laid down the principle, that although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the Courts of the United States are bound to exercise jurisdiction.

In the case of Osborne *vs.* The Bank of the United States, 9 *Wheat.* 738, this question was brought more directly before the Court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case, the Court said, "it may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party
*123 named in the record." The Court added, * "the state not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The information of the governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill, filed by the Governor of Georgia on behalf of the state, against Brailsford.

If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this.

The libel of Madrazo alleges, that the slaves which he claims, "were delivered over to the government of the state of Georgia, pursuant to an Act of the General Assembly of the said state, carrying into effect an Act of Congress of the United States, in that case made and provided; a part of the said slaves sold,

as permitted by said Act of Congress, and as directed by an Act of the General Assembly of the said state; and the proceeds paid into the treasury of the said state, amounting to thirty-eight thousand dollars or more."

The governor appears, and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the Act of the Legislature of Georgia, made to give effect to the Act of Congress on the subject of negroes, mulattoes or people of colour, brought illegally into the United States; and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control.

The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money had been brought into the treasury, or these Africans into the possession of the executive, by any violation of an Act of Congress. The possession has been acquired, by means which it was lawful to employ.

The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.

The decree is pronounced not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is
*124 entirely in his official character, we think the * state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted, that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress; and has done nothing in violation of any law of the United States.

The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him, in that character, be supported.

The decree cannot be sustained as against the state, because, if the 11th amendment to the Constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit, prosecuted not against the state but against the thing; because the thing was not in possession of the District Court.

We are therefore of opinion, that there is error in so much of the decree of the Circuit Court, as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the state of Georgia, or the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves, who were

sold by order of the governor or the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen.

Mr. Justice Johnson dissents. . . .[1]

Ex parte Juan Madrazo.

Supreme Court of the United States, 1833.

[7 *Peters*, 627.]

Juan Madrazo, a subject of the king of Spain, filed a libel praying *admiralty* process against the state of Georgia, alleging that the state was in possession of a certain sum of money, the proceeds of the sale of certain slaves which had been seized as illegally brought into the state of Georgia; and which seizure had been subsequently, under admiralty proceedings, adjudged to have been illegal, and the right of Madrazo to the slaves, and the money arising from the sale thereof, established by the decision of the circuit court of the United States for the district of Georgia. The counsel for the petitioner claimed that the supreme court had jurisdiction of the case, alleging that the 11th amendment of the constitution of the United States, which declares that the judicial power of the United States shall not extend to any suits in *law* or *equity*, did not take away the jurisdiction of the courts of the United States, in suits in *the admiralty*, against a state: Held, that this is not a case where property is in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person. It is a mere personal suit against a state to recover proceeds in its possession, and such a suit cannot be commenced in this court against a state.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This case is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person. It is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state.

United States v. Lee.

Kaufman v. Lee.

Supreme Court of the United States, 1882.

[106 *United States*, 196.]

1. The doctrine that, except where Congress has provided, the United States can not be sued, examined and reaffirmed.
2. That doctrine has no application to officers and agents of the United States who, when as such holding for public uses possession of property, are sued therefor by a person

[1] The dissenting opinion of Mr. Justice Johnson is omitted.—Editor.

claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may, by a court of competent jurisdiction, be the subject-matter of inquiry, and adjudged accordingly.

3. The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, nor private property taken for public use without just compensation, relate to those rights whose protection is peculiarly within the province of the judicial branch of the government. Cases examined which show that the courts extend protection when the rights of property are unlawfully invaded by public officers.

4. In ejectment, the title relied on by the defence was a certificate of sale of the demanded premises to the United States by the commissioners under the act of Congress for the collection of direct taxes. The certificate was impeached on the ground of the refusal of the commissioners to permit the owner to pay the tax, with interest and costs, before the day of sale, by an agent, or in any other way than by payment in person. *Held,* that when the commissioners had established a uniform rule that they would receive such taxes from no one but the owner in person, it avoids such sale, and a tender is unnecessary, since it would be of no avail.

5. *Bennett* v. *Hunter,* 9 Wall. 324, *Tacey* v. *Irwin,* 18 id. 549, and *Atwood* v. *Weems,* 99 U. S. 183, re-examined, and the principle they establish held to apply to a purchase at such a tax sale by the United States as well as by a private person.

Error to the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the court. . . .

Mr. Justice Miller delivered the opinion of the court.

These are two writs of error to the same judgment: one prosecuted by
*197 the United States, *eo nomine;* and the other by * the Attorney-General of the United States, in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the Circuit Court.

The action was originally commenced in the Circuit Court for the county of Alexandria, in the State of Virginia, by George W. P. C. Lee, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant.

As soon as the declaration was filed the case was, by writ of *certiorari,* removed into the Circuit Court of the United States, where all the subsequent proceedings took place. It was tried by a jury, and during its progress an order was made at the request of the plaintiff dismissing the suit as to all of the defendants except Kaufman and Strong. Against each of these a judgment was rendered for separate parcels of the land in controversy; namely, against Kaufman for about two hundred acres of it, constituting the National Cemetery and included within its walls, and against Strong for the remainder of the tract, except seventeen acres in the possession of Maria Syphax.

As the United States was not a party to the suit below, and, while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, under which all the

questions are raised which could be raised under the other, their writ being prosecuted in the interest of the United States, and argued here by the Solicitor-General, the point is immaterial, and the question has not been mooted.

The first step taken in the case after it came into the Circuit Court of the United States was the filing in the clerk's office of that court of the following paper by the Attorney-General:—

*198 *"George W. P. C. Lee
v.
Frederick Kaufman, R. P. Strong, and Others. } In ejectment.

"And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years and now is held, occupied, and possessed by the United States, through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers, as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears.

"Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

"Chas. Devens,
"Att'y-Gen'l U. S."

The plaintiff demurred to this suggestion, and on hearing the demurrer was sustained.

The case was thereupon tried before a jury on the general issue pleaded by Kaufman and Strong, in the course of which the question raised by this suggestion of the Attorney-General was again presented to the court by prayers for instruction, which were rejected, and exceptions taken.

The plaintiff offered evidence establishing title in himself by the will of his grandfather, George Washington Parke Custis, who devised the Arlington estate to his daughter, the wife of General Robert E. Lee, for life, and after her
*199 death to the * plaintiff. This, with the long possession under that title, made a *prima facie* right of recovery in the plaintiff.

The title relied on by the defendants is a tax-sale certificate made by the commissioners appointed under the act of Congress of June 7, 1862, c. 98, entitled "An Act for the collection of direct taxes in the insurrectionary districts within

the United States," as amended by the act of Feb. 6, 1863, c. 21. At this sale the land was bid in for the United States by the commissioners, who gave a certificate of that fact, which was introduced on the trial as evidence by the defendants.

If this sale was valid and the certificate conveyed a valid title, then the title of the plaintiff was thereby divested, and he could not recover. If the proceedings evidenced by the tax sale did not transfer the title, then it remained in him, and, so far as the question of title was concerned, his recovery was rightful.

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record:—

1. Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff?

2. If such an action could be maintained, was the *prima facie* title of the plaintiff divested by the tax sale and the certificate given by the commissioners?

It is believed that no division of opinion exists among the members of this court on the proposition that the rulings of law under which the latter question was submitted by the court to the jury was sound, and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property. . . .

*204 * In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is.

The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government.

The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

*205 * In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were. We have the

authority of Chief Baron Comyns, 1 Digest, 132, Action, C. 1, and 6 Digest, 67, Prerogative; and of the Mirror of Justices, chap. 1, sect. 3, and chap. 5, sect. 1, that such was the law; and of Bracton and Lord Holt, that the King never was suable of common right. It is certain, however, that after the establishment of the petition of right about that time as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King, no attempt has been made to sue the King in any court except as allowed on such petition.

It is believed that this petition of right, as it has been practiced and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." *United States* v. *O'Keefe,* 11 Wall. 178.

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis,* 10 Wall.
*206 15. Congress has created a court in which it * has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President, and may be served on the Attorney-General, as was done in *Chisholm* v. *Georgia,* 2 Dall. 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." *Briggs & Another* v. *Light Boats,* 11 Allen (Mass.), 157. As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled,

by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that in our system of jurisprudence the principle is as applicable to each of the States as it is to the United States, except in those
*207 cases where by the Constitution a State * of the Union may be sued in this court. *Railroad Company* v. *Tennessee,* 101 U. S. 337; *Railroad Company* v. *Alabama,* id. 832.

That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of *Chisholm* v. *Georgia,* where Mr. Justice Wilson, a member of the convention which framed the Constitution, after a learned examination of the laws of England and other states and kingdoms, sums up the result by saying: "We see nothing against, but much in favor of, the jurisdiction of this court over the State of Georgia, a party to this cause." Mr. Chief Justice Jay also considered the question as affected by the difference between a republican State like ours and a personal sovereign, and held that there is no reason why a state should not be sued, though doubting whether the United States would be subject to the same rule.

The first recognition of the general doctrine by this court is to be found in the case of *Cohens* v. *Virginia,* 6 Wheat. 264.

The terms in which Mr. Chief Justice Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign independent State is not suable except by its own consent." This general proposition, he adds, will not be controverted.

And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. *United States* v. *Clarke,* 8 Pet. 436; *United States* v. *McLemore,* 4 How. 286; *Hill* v. *United States,* 9 id. 386; *Nations* v. *Johnson,* 24 id. 195; *The Siren,* 7 Wall. 152; *The Davis,* 10 id. 15.

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made de-
*208 fendants by name, is not permitted to interfere with the judicial * enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

But little weight can be given to the decisions of the English courts on this branch of the subject, for two reasons:—

1. In all cases where the title to property came into controversy between the crown and a subject, whether held in right of the person who was king or as representative of the nation, the petition of right presented a judicial remedy,—a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the King who held possession of such property, when the issue could be made with the King himself as defendant.

2. Another reason of much greater weight is found in the vast difference

in the essential character of the two governments as regards the source and the depositaries of power.

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the *people,* who are there called *subjects,* are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, *209 has established his right to property, * there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Another class of cases in the English courts, in which attempts have been made to subject the public ships and other property of foreign and independent nations found within English territory to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange* v. *McFaddon, 7* Cranch, 116; *Luther* v. *Borden, 7* How. 1; *State of Georgia* v. *Stanton,* 6 Wall. 50.

The earliest case in this court in which the true rule is laid down, and which, bearing a close analogy to the one before us, seems decisive of it, is *United States* v. *Peters,* 5 Cranch, 115. In an admiralty proceeding commenced before the formation of the Constitution, and which afterwards came into the District Court of the United States for Pennsylvania, that court, after full hearing, had decided that the libellants were entitled to the proceeds of the sale of a vessel condemned as prize of war, which had come to the possession of David Rittenhouse as treasurer of Pennsylvania. The district judge had declined to issue any process to enforce his decree against the representatives of Rittenhouse, on the ground that the funds were held as the property of that State, and that as she could not be subjected to judicial process, neither could the officer who held the money in her right. The analogy to the case before us will be seen when it is further stated that this claim of the State to the money had been fully presented, and that the court had decided that the libellants and

not the State were legally entitled to it. In that case, as in this, it was argued that the suit was in reality against the State. But, on an application
*210 therefor, a writ * of *mandamus* to compel the judge of the District Court to proceed in the execution of his decree was granted. In delivering the opinion, Mr. Chief Justice Marshall says: "The State cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, when a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.*"

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.

It may be said—in fact it is said—that the present case differs from the one in 5 Cranch, because the officers who are sued assert no personal possession, but are holding as the mere agents of the United States, while the executors of Rittenhouse held the money until a better right was established. But the very next case in this court of a similar character, *Meigs* v. *McClung's Lessee*, 9 Cranch, 11, shows that this distinction was not recognized as sound. The property sued for in that case was land on which the United States had a
*211 garrison erected at a cost of * $30,000, and the defendants were the military officers in possession; and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, "because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction." They further insisted, says the bill of exceptions, that the United States had a right by the Constitution to appropriate the property of the individual citizen. The court below overruled these objections, and held that the title being in plaintiff he might recover, and that "if the land was private property the United States could not have intended to deprive the individual of it without making him compensation therefor."

Although the judgment of the Circuit Court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, Mr. Chief Justice Marshall concludes his opinion in this emphatic language: "This court is unanimously and clearly of opinion that the Circuit

Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, *and that the plaintiff below might sustain his action.*"

We are unable to discover any difference whatever in regard to the objection we are now considering between this case and the one before us.

Impressed by the force of this argument, counsel say that the question of the objection arising out of the possession of the United States was not considered in that case, because it was not urged in argument by counsel. But it is manifest that it was so set out in the bill of exceptions, and so much relied on in the court below that it could not have escaped the attention of the court and of the eminent man who had only six years before delivered the opinion in the case of *United States* v. *Peters.* Nor could the case have been decided as it was if the doctrine now contended for be sound, since the United States was dispossessed of an occupied garrison by the effect of the judgment against the officers in charge of it.

In *Wilcox* v. *Jackson,* 13 Pet. 498, the contest was over a fort of the
*212 United States which had been in its continued possession * for over thirty years, and was so occupied when the suit was brought against its officers to dispossess them. The case came from the Supreme Court of Illinois to this court on a writ of error, and the judgment in favor of the plaintiff was reversed. The question now under consideration was not passed upon directly by this court. But a long examination of the question whether the plaintiff had proved title in himself, and a decision that while the State courts of Illinois held a certificate of purchase from the United States to be a legal title under her statute, that statute was invalid, might all have been avoided by the simple declaration that the United States, being in possession of the property as a fort, no action at law against its officers could be maintained. But no such proposition was advanced by counsel on either side or considered by the court.

There is a very satisfactory reason for this. *United States* v. *Peters, Meigs* v. *McClung,* and *Osborn* v. *Bank of United States,* had all involved the same question, and in the first and last of these cases the principle was fully discussed, and in the other necessarily decided in the negative. And in *The Governor of Georgia* v. *Madrazo,* 1 Pet. 110, the court had referred to these cases, and again asserted the principle, quoting the language of them. Counsel were not justified in asking the court to reconsider it while most of the judges were still on the bench, including the Chief Justice, who had made those decisions.

Osborn v. *Bank of United States,* 9 Wheat. 738, is a leading case, remarkable in many respects, and in none more than in those resembling the one before us.

It was this: The State of Ohio having levied a tax upon the branch of the Bank of the United States located in that State, which the bank refused to pay, Osborn, auditor of the State, was about to proceed to collect said tax by a seizure of the money of the bank in its vaults, and an amended bill alleged that he had so seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the treasurer of the State, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants as well as Osborn and his assistant, Harper.

*213 * One of the objections pressed with pertinacity all through the case to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a defendant to the bill, was the real party in interest. That all the parties sued were her officers,—her auditor, her treasurer, and their agents,—concerning acts done in their official character, and in obedience to her laws. It was conceded that the State could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that while the State could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction, and that the bill must be dismissed.

A few citations from the opinion of Mr. Chief Justice Marshall will show the views entertained by the court on the question thus raised. At page 842 of the long report of the case he says:—

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

In another place he says: "The process is substantially, though not in form, against the State, . . . and the direct interest of the State in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until *214 the State was before the court. But this was not in the power of * the bank, . . . and the very difficult question is to be decided, whether, in such a case, the court may act upon agents employed by the State and on the property in their hands." In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States." Again: "The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party who is not made so in the record." Again: "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be

settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

The decree of the Circuit Court ordering a restitution of the money was affirmed.

Grisar v. *McDowell,* 6 Wall. 363, was an action in the Circuit Court against General McDowell to recover possession of property held by him as an officer of the United States which had been set apart and reserved for military purposes. Though this was set up by him as part of his defence, it does not appear that in the argument of counsel for the government, or in the opinion of the court, any importance was attached to this circumstance; but the opinion of Mr. Justice Field in this court examines the case elaborately on the ques-
*215 tion whether * plaintiff or the government had the title to the land. If the doctrine now contended for is sound, the case should have proceeded no further on the suggestion, not denied, that the property was held for public use by a military officer under orders from the President.

Brown v. *Huger,* 21 How. 305, is of a precisely similar character, for the possession of the military arsenal at Harper's Ferry, in which, while the fact of its possession by the United States was set out in the bill of exceptions, no attention is given to that fact in the opinion of this court, which consists of an elaborate examination of plaintiff's title, held to be insufficient.

These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray,* 16 Wall. 203, the case of *Osborn* v. *Bank of United States* is cited with approval as establishing these among other propositions: "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

Though not prepared to say now that the court can proceed against the officer in "all respects" as if the State were a party, this may be taken as intimating in a general way the views of the court at that time.

The Siren, 7 Wall. 152, and *The Davis,* 10 id. 15, are instances where the court has held that property of the United States may be dealt with by subjecting it to maritime liens, where this can be done without making the United States a party.

This examination of the cases in this court establishes clearly this
*216 result: that the proposition that when an individual is * sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence,

it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson, Brown* v. *Huger,* and *Grisar* v. *McDowell,* it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions.

It is true that there are expressions in the opinion of the court in the case of *Carr* v. *United States,* 98 U. S. 433, which are relied on by counsel with much confidence as asserting a different doctrine.

That was a case in which the United States had filed a bill in the Circuit Court for the District of California to quiet title to the land on which a marine hospital had been built. To rebut the evidence of title offered by the plaintiffs, the defendant had relied on certain judgments rendered in the State courts, in which the unsuccessful parties set up title in the United States, under which they claimed. It appeared that the person who was district attorney of the United States had defended these actions, and the question under discussion was whether the United States was estopped by the proceedings so as to be unable to sustain the suit to quiet title. After stating the general doctrine that the United States cannot be sued without her consent, and the further proposition that no such consent can be given except by Congress, which is a sufficient reason why they cannot be concluded by an action to which they are not parties, the learned justice who delivered the opinion proceeded to make some remarks as to cases in which actions would or would not lie against officers
*217 of the government * in relation to property of the United States in their possession. As these remarks were not necessary to the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the court which decided the case.

That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided.

The fact that the property which is the subject of this controversy is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, and invasions of forts and arsenals of the United States. Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

The cases already cited of *Meigs* v. *McClung, Wilcox* v. *Jackson, Georgia* v. *Madrazo, Grisar* v. *McDowell, Brown* v. *Huger,* and *Osborn* v. *Bank of United States,* necessarily involved this question, for the property recovered by

the plaintiff in the case of *Meigs* v. *McClung* was a garrison and barracks then in use for such purposes by the officers of the United States who were sued. In *Wilcox* v. *Jackson,* an action was brought to recover, among other things, a fort which had been in the occupation of the United States for thirty years, and which was then occupied by an officer of the army of the United States
*218 and his command. In *Osborn* v. *Bank of United States,* the * money sued for and recovered by the final decree of this court was claimed by the State of Ohio as part of her public funds, and devoted by her laws to public uses in all the exigencies of the public service; so that the authorities we have examined, if they are worth anything, meet this objection as they meet the others which we have considered.

The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States, whose language is: "That no person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan,* 4 Wall. 2.

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the gov-
*219 ernment, * must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the

existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court,—a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any
*220 lawful authority to do this, or that the legislative * body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte Milligan,* 4 Wall. 2; *Kilbourn* v. *Thompson,* 103 U. S. 168.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both

branches of Congress and approved by the President to be unconstitu-
*221 tional, that the * courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

One of these, of no little significance, is, that during the existence of the government for now nearly a century under the present Constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the government, have been conducted to a successful issue. One of these was a great civil war, such
*222 as the world has seldom * known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority necessary to put down the rebellion; yet no improper interference with the exercise of that authority was permitted or attempted by the courts. *State of Mississippi* v. *Johnson,* 4 Wall. 475; *State of Georgia* v. *Stanton,* 6 id. 50; *State of Georgia* v. *Grant,* id. 241; *Ex parte Tarble,* 13 id. 397.

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made,

a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights, or the authority of the Federal government may come in question, which cannot
*223 be removed into a court of the United States * under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal government.

The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands.

While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all.

Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.

From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is

Affirmed.

Mr. Justice Gray, with whom concurred Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Woods, dissenting. . . .[1]

[1] The dissenting opinion of Mr. Justice Gray is omitted.—Editor.

State of Louisiana v. Jumel.
Elliott v. Wiltz.

Supreme Court of the United States, 1882.

[107 *United States,* 711.]

By an act of the State of Louisiana of 1874 it was declared that certain bonds of the State were to bear a specified rate of interest, and it was further directed that taxation was to be imposed to create a fund for their redemption. This act was protected by an amendment to the State Constitution, passed the same year, declaring that the provisions of the act would not be varied and that it constituted a contract with the bondholders.

Nowithstanding the act of 1874 and the constitutional amendment, a new constitution, adopted in 1879, reduced the rate of interest on the bonds issued under the act of 1874 and the officers of the State were forbidden to levy the rate of taxation provided for in that act.

On suits brought by the holders of bonds it was held:

1. That the ordinance forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect.
2. That the execution of the contract cannot be enforced, nor the relief sought be awarded, in a suit to which she is not a party, but which is brought against officers, who are merely obeying the positive orders of the supreme political power of the State.
3. That at the time the bonds were issued or since no statute or judicial decision authorized a suit against Louisiana in her own courts, nor can she be sued in the courts of the United States by a citizen of another State.
4. That the money in her treasury is her property, held by her officers, not in trust for her creditors nor as their agents, but as their servants, and that the courts cannot control them in the administration of her finances, and thus oust the jurisdiction of the political power of the State.

THE first case is in error to the Circuit Court of the United States for the Eastern District of Louisiana, and the second is an appeal from that court.

By force of the act of the legislature of Louisiana, known as Act No. 3 of 1874, and the constitutional amendment adopted in that year, which provided that bonds should be issued under that act in exchange for valid outstanding bonds and warrants at the rate of sixty cents in the new bonds for one dollar of the old bonds and warrants, the State entered into a formal contract, the obligation of which it was forbidden by the Constitution of the United States to impair, and thereby stipulated with each holder of the new bonds so issued that an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State should be levied and collected, and the income therefrom applied solely to the payment of the bonds and coupons; that the tax levied by the act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation; and that no further authority than that contained in the act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the coupons and bonds.

After the said act of 1874 was passed, and the constitutional amendment sanctioning it was adopted, sundry parties, citizens of another State, ex-
*712 changed * their old bonds for new coupon bonds executed pursuant to

the requirements of that act, and demanded of the proper State Officers payment of the coupons which fell due Jan. 1, 1880, and the application thereto of the funds collected under the levy imposed by the act. Payment was refused solely on the ground that it was forbidden by the third article of the State Debt Ordinance of the new Constitution adopted July 23, 1879; and the treasurer claimed to hold the funds only for the purposes for which they were appropriated by the terms of that Constitution. The parties then brought in the State court of Louisiana a suit for a *mandamus* against the auditor and treasurer of state and the other members of the board of liquidation, requiring them to apply the funds in the treasury derived from the taxes levied or to be levied to the retirement of the bonds, and to execute the said act according to its intent and purpose. They also brought in the Circuit Court against the same defendants a suit praying for an injunction forbidding them to recognize as valid said ordinance, and to oppose the full execution of said act and the constitutional amendment. The suit for *mandamus* was removed to the Circuit Court.[1]

Mr. Chief Justice Waite delivered the opinion of the court. . . .

*719 * We have no doubt it was the intention of the State of Loisiana to enter into a formal contract with each and every holder of bonds so issued under the act of 1874, to levy and collect an annual tax of five and one-half mills on the dollar of the assessed value of all the real and personal property in the State, and to apply the revenue derived therefrom to the payment of the principal and interest of the bonds, and to no other purpose. By the obligation so entered into it was also agreed, that the tax levied by the act and confirmed by the Constitution should be a continuing annual tax until the bonds, principal and interest, were paid in full; that the appropriation of the revenue derived therefrom should be a continuing annual appropriation, and that no further authority than that contained in the act should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the obligations of the bonds. Whatever may be ordinarily the effect of promise or a pledge of faith by a State, the language employed

*720 in this instance shows * unmistakably a design to make these promises and these pledges so far contracts that their obligation would be protected by the Constitution of the United States against impairment.

It is equally manifest that the object of the State in adopting the "Debt Ordinance" in 1879 was to stop the further levy of the promised tax, and to prevent the disbursing officers from using the revenue from previous levies to pay the interest falling due in January, 1880, as well as the principal and interest maturing thereafter.

The bonds and coupons which the parties to these suits hold have not been reduced to judgment, and there is no way in which the State, in its capacity as an organized political community, can be brought before any court of the State, or of the United States, to answer a suit in the name of these holders to obtain such a judgment. It was expressly decided by the Supreme Court of the State in *State, ex rel. Hart,* v. *Burke,* 33 La. Ann. 498, that such a suit could not be brought in the State courts, and under the Eleventh Amendment of the Constitution no State can be sued in the courts of the United States by a citizen of

[1] The facts of the case are stated as they appear in the head-note of the official report.—Editor.

another State. Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere, either by *mandamus* or injunction, against the State in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do.

These, then, are suits by creditors at large, of the class provided for in the act of 1874, to compel, by judicial process, the officers of the State to enforce the provisions of the act, when the State, by an amendment to its Constitution, has undertaken to prohibit them from doing so, and when the court, if it requires an officer to proceed, cannot protect him with a judgment to which the State is a party. The persons sued are the executive officers of the State, and they are proceeded against in their official capacity. The money in the treasury is the property of the State, and not in any legal sense the property of the bond or coupon holders. If it be lost or destroyed, the loss will fall alone on the State or its agents, and the bond holders will be entitled to payment in full from other sources. True, the money was raised to pay this particular class of debts,

*721 * and the agreement was that it should not be used for any other purpose; but, notwithstanding this, the State has undertaken to appropriate it to defray the expenses of the government. In this way the State has violated its contract, and, if it could be sued, might perhaps be made to set aside its wrongful appropriation of the money already in hand, and raise more by taxation, if necessary.

That the Constitution of 1879 on its face takes away the power of the executive officers to comply with the terms of the act of 1874 cannot be denied. As against everything but the outstanding bonds and coupons, this Constitution is the fundamental law of the State, and it is only invalid so far as it impairs the obligation of the contract on the faith of which the bonds and coupons were taken by their respective holders. The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings.

The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done.

The parties prosecuting the suits do not, in direct terms, ask for the payment of the bonds and coupons they hold. In fact, this seems to have been purposely avoided, for in the suit for *mandamus* the petition was amended before the hearing by striking out all that would have the effect of confining the command of the writ to such a payment, and left the prayer for an order requiring the use of the money raised under the act of 1874 for the redemption and retirement generally of all the bonds and coupons of the issue. In the suit in equity, while it was asked that the "Debt Ordinance" of 1879 might be declared

*722 invalid as against the complainants, payment of the * amount due was only sought through the general administration of the finances in accord-

ance with the provisions of the act of 1874. In neither of the suits was any inquiry to be instituted in respect to the particular bonds and coupons held by the plaintiffs, or any special relief afforded as to them. All that is asked will inure as much to the benefit of the other holders of similar obligations as to the particular parties to these suits. So that the remedy sought implies power in the judiciary to compel the State to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the State to the extent that may be necessary to accomplish the end in view.

It is insisted, however, that the money in the treasury collected from the tax levied for the year 1879 constitutes a trust fund of which the individual defendants are *ex officio* trustees, and that they may be enjoined as such trustees from diverting it from the purposes to which it was pledged under the contract. The individual defendants are the several officers of the State, who, under the law, compose the board of liquidation. That board is, in no sense, a custodian of this fund. Its duty was to negotiate the exchange of the new bonds for the old on the terms proposed. It had nothing to do with levying the tax, collecting the money, or paying it out further than by purchasing the bonds with any surplus there might be from time to time in the treasury over what was required to meet the interest. The provision in the law that it shall be the duty of the auditor, treasurer, and the board, respectively, to collect the tax, pay the interest, and redeem the bonds evidently means no more than that the auditor and treasurer shall perform their respective duties under the general laws in the assessment and collection of the tax, and shall pay in the usual manner the interest and principal of the bonds as they respectively fall due, and that the board shall purchase and retire the bonds whenever there is a surplus, which, under the law, is to be used for that purpose.

The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of
*723 other public moneys. The taxes * were collected by the tax-collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them. . . .
*724 * There is nothing in any of the cases in this court that are relied on which, to our minds, authorizes any such relief as is asked.[1] . . .

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[1] The Chief Justice here referred to and commented upon the following cases:
Osborn v. *Bank of the United States* (9 Wheaton, 738), decided in 1824;
Davis v. *Gray* (16 Wallace, 203), decided in 1872;
Board of Liquidation v. *McComb* (92 U. S. 531), decided in 1875;
United States v. *Lee* (106 U. S. 196), decided in 1882.
This portion of the opinion is omitted.—Editor.

*727 Little need be said with special reference to the suit for *mandamus*. In this no trust is involved; but the simple question presented is, whether a single bondholder, or a committee of bondholders, can, by the judicial writ of *mandamus*, compel the executive officers of the State to perform generally their several duties under the law. The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty. What they ask is that the auditor of state, the treasurer of state, and the board of liquidadation may be required to enforce the act of 1874, and "carry out, perform, and discharge each and every one of the ministerial acts, things, and duties respectively required of them, . . . according to the full and true intent and purport of that act." Certainly no suit begun in the Circuit Court for such relief would be entertained, for that court can ordinarily grant a writ of *mandamus* only in aid of some existing jurisdiction. *Bath County* v. *Amy*, 13 Wall. 244; *Davenport* v. *County of Dodge*, 105 U. S. 237. Our attention has been called to no case in the courts of Louisiana in which such general relief has been afforded; and the jurisdiction of the Circuit Court was, therefore, in no way enlarged through the operation of the removal acts, even if this is a case which was properly removed,—a question we do not deem it necessary now to decide. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It *728 needs no argument to show that the political power cannot be thus * ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

Judgment affirmed.
Decree affirmed.

MR. JUSTICE FIELD and MR. JUSTICE HARLAN dissented.

Poindexter v Greenhow, Treasurer.

Supreme Court of the United States, 1884.

[114 *United States*, 270.]

In an action of detinue for personal property, distrained by the defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the State of Virginia under the Funding Act of March 30, 1871: *Held,*

1. That by the terms of that act, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon-holder and the State that such coupons should "be receivable at and after maturity for all taxes, debts, dues, and demands due the State"; the right of the coupon-holder, under which, was to have his coupons received for taxes when offered, and that any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract, and void as against coupon-holders.
2. The faculty of being receivable in payment of taxes was of the essence of the right. It constituted a self-executing remedy in the hands of a taxpayer, and it became thereby the legal duty of every tax collector to receive such coupons, in payment of taxes, upon an equal footing and with equal effect, as though they were money; after a tender of such coupons duly made for that purpose, the situation and rights of the tax-payer and coupon-holder were precisely what they would have been if he had made a like tender in money.
3. It is well settled by many decisions of this court that, for the purpose of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, either being sufficient to deprive the collecting officer of all authority for further action, and making every subsequent step illegal and void.
4. The coupons in question are not "bills of credit," in the sense of the Constitution, which forbids the States to "emit bills of credit"; because although issued by the State of Virginia on its credit, and made receivable in payment of taxes, and negotiable, so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals, and between government and individuals, for the ordinary purposes of society.
5. An action or suit brought by a tax-payer, who has duly tendered such coupons in payment of his taxes, against the person who, under color of office as tax collector, and acting in the enforcement of a void law, passed by the Legislature of the State, having refused such tender of coupons, proceeds by seizure and sale of the property of the plain-
*271 tiff, to enforce the collection * of such taxes, is an action or suit against him personally as a wrong-doer, and not against the State, within the meaning of the Eleventh Amendment to the Constitution of the United States.
6. Such a defendant, sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence, but is bound to establish it; and, as the State is a political corporate body, which can act only through agents, and command only by laws, in order to complete his defence, he must produce a valid law of the State, which constitutes his commission as its agent, and a warrant for his act.
7. The act of the General Assembly of Virginia of January 26, 1882, "to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt," requiring tax collectors to receive in discharge of the taxes, license taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else, and thereby forbidding the receipt of coupons issued under the act of March 30, 1871, in payment therefor, although it is a legislative act of the government of Virginia, is not a law of the State of Virginia, be-

cause it impairs the obligation of its contract, and is annulled by the Constitution of the United States.

8. The State has passed no such law, for it cannot; and what it cannot do, in contemplation of law, it has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. This strips the defendant of his official character, and convicts him of a personal violation of the plaintiff's rights, for which he must personally answer.

9. It is no objection to the remedy in such cases, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right, for the cases are numerous where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States.

10. In cases of detinue the action is purely defensive on the part of the plaintiff. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. It is analogous to the preventive remedy of injunction in equity when that jurisdiction is invoked, of which frequent examples occur in cases to prevent the illegal taxation of national banks by State authorities. . . .

*281 * In so far as material, the facts of this case are that in 1871, the State of Virginia passed a funding act issuing bonds to run for a period of years, and declaring that the coupons thereof should "be receivable, at and after maturity, for all taxes, debts, dues and demands due to the State."

In 1879 an act was passed by the State of Virginia authorizing the collection of delinquent taxes by distrain of personal property.

By an act of 1882 it was provided that taxes should be paid in "gold, silver, United States Treasury notes, National Bank currency, and nothing else."

It appeared that one Poindexter, the plaintiff in the case, owed the State of Virginia for taxes on property in the City of Richmond, for the year 1882, the sum of twelve dollars and forty-five cents; that he tendered to one Greenhow, the Treasurer of the City of Richmond, and the defendant in the action, forty-five cents in lawful money of the United States, and coupons issued by the State of Virginia under the act of 1871; that the coupons and money so tendered amounted to the sum due the State by the plaintiff, for taxes; that the defendant refused to receive the coupons and money so tendered; that the defendant, believing himself authorized under the acts of 1879 and 1882, entered the "plaintiff's place of business in said City, levied upon and took possession of a desk, the property of the plaintiff now sued for, for the purpose of selling the same to pay the taxes due from him." Upon suit brought for the desk, which was of the value of thirty dollars, judgment was entered in favor of the defendant.

It further appeared that the plaintiff, Poindexter, raised the federal question that the act of 1882 requiring payment of taxes in gold or silver was an impairment of a contract created by the act of 1871, between the State of Virginia and the holder of the coupon, and that because of the federal question, the plaintiff was entitled to bring suit for the recovery of his property in the federal court. It also appeared that the defendant, Greenhow, claimed to be acting as an official

of the State of Virginia, and in pursuance of a law of that State requiring him to distrain property of the plaintiff if the taxes in question were not paid in gold or silver.

Upon this statement of facts,

Mr. Justice Matthews delivered the opinion of the court.[1]

*282 * The case, then, of the plaintiff below is reduced to this. He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural *283 private person, has unlawfully, with force and arms, seized, * taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error. These we proceed now to examine in their order.

It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the United States, Art. I, sec. 10, which declares that no State shall "emit bills of credit," and is therefore void. . . .

*284 * It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. . . .

*285 * It is next objected, that the suit of the plaintiff below could not be maintained, because it is substantially an action against the State of Virginia, to which it has not assented. It is said, that the tax collector, who is sued, was an officer and agent of the State, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that, consequently, he was guilty of no personal wrong, but acted only *286 in an official capacity, representing * the State, and, in refusing to receive the coupons tendered, simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that if any wrong has been done, it has been done by the State in refusing to perform its contract, and for that wrong the State is alone liable, but is exempted from suit by the Eleventh Article of Amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the Constitutional provision that no State shall pass any law impairing the obligation of contracts; for, it has long been settled, that contracts between a State and an individual are as fully protected by the Constitution as contracts be-

[1] The facts in the case have been taken from the statement, very much abbreviated, contained in the opinion of Mr. Justice Matthews.—Editor.

tween two individuals. It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences, to the rights of the litigants, may be the result of the determination. The cases establishing these propositions, which have been decided by this court since the adoption of the Eleventh Amendment to the Constitution, are numerous. *Fletcher* v. *Peck,* 6 Cranch, 87; *New Jersey* v. *Wilson,* 7 Cranch, 164; *Green* v. *Biddle,* 8 Wheat. 1, 84; *Providence Bank* v. *287 *Billings,* 4 Pet. 514; *Woodruff* v. *Trapnall,* 10 * How. 190; *Wolff* v. *New Orleans,* 103 U. S. 358; *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436.

It is also true, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties. Accordingly, it was held in *New Hampshire* v. *Louisiana,* and *New York* v. *Louisiana,* 108 U. S. 76, that, although the judicial power of the United States extends to "controversies between two or more States," it did not embrace a suit in which, although nominally between two States, the plaintiff State had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names. So, on the other hand, in *Cunningham* v. *Macon and Brunswick Railroad Co.,* 109 U. S. 446, where the State of Georgia was not nominally a party on the record, it was held that, as it clearly appeared that the State was so interested in the property that final relief could not be granted without making it a party, the court was without jurisdiction.

In that case, the general question was discussed in the light of the authorities, and the cases in which the court had taken jurisdiction, when the objection had been interposed, that a State was a necessary party to enable the court to grant relief, were examined and classified. The second head of that classification is thus described: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." And in illustration of this principle reference was made to *Mitchell* v. *Harmony,* 13 How. 115; *Bates* v. *Clark,* 95 U. S. 204; *Meigs* v. *McClung,* 9 Cranch, 11; *Wilcox* v. *Jackson,* 13 *288 Pet. 498; *Brown* v. *Huger,* 21 How. 305; * *Grisar* v. *McDowell,* 6 Wall. 363; and *United States* v. *Lee,* 106 U. S. 196.

The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted

his act and exonerated him, cannot rest on the bare assertion of his defence, He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence.

No better illustration of this principle can be found than that which is furnished by the case of *United States* v. *Lee,* 106 U. S. 196, in which it was applied to a claim made on behalf of the National Government. The action was one in ejectment, to recover possession of lands, to which the plaintiff claimed title. The defendants were natural persons, whose defence was that they were in possession as officers of the United States under the orders of the govern-
*289 ment and for its * uses.

The Attorney-General called this aspect of the case to the attention of the court, but without making the United States a party defendant. It was decided by this court that to sustain the defence, and to defeat the plaintiff's cause of action, it was necessary to show that the defendants were in possession under the United States, and on their behalf, by virtue of some valid authority. As this could not be shown, the contrary clearly appearing, possession of lands, actually in use as a national cemetery, was adjudged to the plaintiffs. The decision in that case was rested largely upon the authority of *Osborn* v. *Bank of the United States,* 9 Wheat. 738, which was a suit in equity against an officer of the State of Ohio, who sought to enforce one of her statutes which was in violation of rights secured to the bank by the Constitution of the United States. The defendants, Osborn and others, denied the jurisdiction of the court, upon the ground that the State was the real party in interest and could not be sued, and that a suit against her officers, who were executing her will, was in violation of the Eleventh Amendment of the Constitution. To this objection, Chief Justice Marshall replied: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a Court of Chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose

power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." This language, it may be observed, was quoted with approval in *United States* v. *Lee*. The principle which it enunciates
*290 constitutes * the very foundation upon which the decision in that case rested.

In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford* v. *United States,* 101 U. S. 341, that the maxim, that the king can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. It was upon the ground of this important distinction that this court proceeded in the case of *Texas* v. *White,* 7 Wall. 700, when it adjudged that the acts of secession, which constituted the civil war of 1861, were the unlawful acts of usurping State governments, and not the acts of the States themselves, inasmuch as "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States;" and that, consequently, the war itself was not a war between the States, nor a war of the United States against States, but a war
*291 of the United States against * unlawful and usurping governments, representing not the States, but a rebellion against the United States. This is, in substance, what was said by Chief Justice Chase, delivering the opinion of the court in *Thorington* v. *Smith,* 8 Wall. 1, 9, when he declared, speaking of the Confederate government, that "it was regarded as simply the military representative of the insurrection against the authority of the United States." The same distinction was declared and enforced in *Williams* v. *Bruffy,* 96 U. S. 176, 192, and in *Horn* v. *Lockhart,* 17 Wall. 570, both of which were referred to and approved in *Keith* v. *Clark,* 97 U. S. 454, 465.

This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism whether of the one or the many,

which enables the agent of the State to declare and decree that he is the State; to say "*L'État c'est moi.*" Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth.

It was said by Chief Justice Chase, speaking for the whole court in
*292 *Lane County* v. *Oregon,* 7 Wall. 71, 76, that the people * through the Constitution of the United States, "established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States." In no other way can the supremacy of that Constitution be maintained. It creates a government in fact, as well as in name, because its Constitution is the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding;" and its authority is enforced by its power to regulate and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise, that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a State, which is in violation of the Constitution of the United States, as his authority for taking or holding property, to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land, as between the individual parties, is to coerce the State, ignores the fundamental principles on which the Constitution rests, as contrasted with the Articles of Confederation, which it displaced; and, practically, makes the statutes of the States the supreme law of the land within their respective limits.

When, therefore, by the act of March 30, 1871, the contract was made, by which it was agreed that the coupons issued under that act should thereafter be receivable in payment of taxes, it was the contract of the State of Virginia, because, though made by the agency of the government, for the time being, of the State, that government was acting within the scope of its authority, and spoke with its voice as its true representative; and inasmuch as, by the Constitution of the United States, which is also the supreme law of Virginia, that contract, when made, became thereby unchangeable and irrepealable by the State, the subsequent act of January 26, 1882, and all other like acts, which deny
*293 the obligation of that contract * and forbid its performance, are not the acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of

it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. The argument, therefore, which seeks to defeat the present action, for the reason that it is a suit against the State of Virginia, because the nominal defendant is merely its officer and agent, acting in its behalf, in its name, and for its interest, and amenable only to it, falls to the ground, because its chief postulate fails. The State of Virginia has done none of these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands. The plaintiff in error, in fact and in law, is representing her, as he seeks to establish her law, and vindicates her integrity as he maintains his own right.

Tried by every test which has been judicially suggested for the determination of the question, this cannot be considered to be a suit against the State. The State is not named as a party in the record; the action is not directly upon the contract; it is not for the purpose of controlling the discretion of executive officers, or administering funds actually in the public treasury, as was held to be the case in *Louisiana* v. *Jumel,* 107 U. S. 711; it is not an attempt to compel officers of the State to do the acts which constitute a performance of its contract by the State, as suggested by a minority of the court in *Antoni* v. *Greenhow,* 107 U. S. 769, 783; nor is it a case where the State is a necessary party, that the defendant may be protected from liability to it, after having answered to the present plaintiff. For, on this supposition, if the accounting officers of the State government refuse to credit the tax collector with coupons received by him in payment of taxes, or seek to hold him responsible for a failure to execute the void statute, which required him to refuse coupons in pay-
*294 ment of taxes, in any action or * prosecution brought against him in the name of the State, the grounds of the judgment rendered in favor of the present plaintiff will constitute his perfect defence. And as that defence, made in any cause, though brought in a State court, would present a question, arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect, upon a writ of error, without regard to the amount or value in dispute.

In the case of *Osborn* v. *The Bank of the United States,* 9 Wheat. 738, 853, Chief Justice Marshall put, by way of argument and illustration, the very case we are now considering. He said: "Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the Federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far

from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officers. And yet the argument admits that the action, in such a case, would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in the possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action
*295 would claim the specific article seized for the tax, * and would obtain it, should the seizure be deemed unlawful."

Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. In this respect, it is upon the same footing with the preventive remedy of injunction in equity, when that jurisdiction is invoked, and of which a conspicuous example, constantly followed in the courts of the United States, was the case of *Osborn* v. *The Bank of the United States, ubi supra.* In that case, the taxing power of the State was resisted on the ground that its exercise threatened to deprive the complainant of a right conferred by the Constitution of the United States. The jurisdiction has been constantly exerted by the courts of the United States to prevent the illegal taxation of national banks by the officers of the States; and in *Cummings* v. *National Bank,* 101 U. S. 153, 157, it was laid down as a general principle of equity jurisdiction, "that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States. At the present term of this court, at least three cases
*296 have been decided, in which railroad companies * have been complainants in equity, seeking to restrain officers of States from collecting taxes, on the ground of an exemption by contract, and no question of jurisdiction has been raised. The practice has become common, and is well settled on incontestable principles of equity procedure. *Memphis Railroad* v. *Railroad Commissioners,* 112 U. S. 609; *St. Louis, &c., Ry. Co.* v. *Berry,* 113 U. S. 465; *Chesapeake & Ohio Railroad Co.* v. *Miller, ante,* 176.

It is still urged upon us, however, in argument, that notwithstanding all that has been or can be said, it still remains that the controversy disclosed by the record is between an individual and the State; that the State alone has any real interest in its determination; that the practical effect of such determination

is to control the action of the State in the regular and orderly administration of its public affairs; and that, therefore, the suit is and must be regarded as a suit against the State, within the prohibition of the Eleventh Amendment to the Constitution. Omitting for the time being the consideration already enforced, of the fallacy that lies at the bottom of this objection, arising from the distinction to be kept in view between the government of a State and the State itself, the premises which it assumes may all be admitted, but the conclusion would not follow. The same argument was employed in the name of the United States in the Lee Case, and did not prevail. It was pressed with the greatest force of which it was susceptible in the case of *Osborn* v. *The Bank of the United States,* and was met and overcome by the masterly reasoning of Chief Justice Marshall. It appeared early in the history of this court, in 1799, in the case of *Fowler* v. *Lindsey,* 3 Dall. 411, in which that able magistrate, Mr. Justice Washington, pronounced his first reported opinion. On a motion to remove the cause by *certiorari* from the Circuit Court, on the ground that it was a suit in which a State was a party, it being an ejectment for lands, the title to which was claimed under grants from different States, he said: "A case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be a case in which a State is either nominally or
*297 substantially the party. * It is not sufficient that a State may be consequentially affected; for in such case (as where the grants of different States are brought into litigation), the Circuit Court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions that have been founded on the remote interest of the State, in making retribution to her grantees, upon the event of an eviction."

The thing prohibited by the Eleventh Amendment is the exercise of jurisdiction in a "suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Nothing else is touched; and suits between individuals, unless the State is the party, in a substantial sense, are left untouched, no matter how much their determination may incidentally and consequentially affect the interests of a State, or the operations of its government. The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax collectors, vanishes at once upon the suggestion that such interference is not possible, except when that government seeks to enforce the collection of its taxes contrary to the law and contract of the State, and in violation of the Constitution of the United States. The immunity from suit by the State now invoked, vainly, to protect the individual wrong-doers, finds no warrant in the Eleventh Amendment to the Constitution, and is, in fact, a protest against the enforcement of that other provision which forbids any State from passing laws impairing the obligation of contracts. To accomplish that result requires a new amendment, which would not forbid any State from passing laws impairing the obligation of its own contracts.

What we are asked to do is, in effect, to overrule the doctrine in *Fletcher* v. *Peck,* 6 Cranch, 87, and hold that a State is not under a constitutional obligation to perform its contracts, for it is equivalent to that to say that it is not subject to the consequences when that constitutional prohibition is applied to suits between individuals. We could not stop there. We should be required to go still further, and reverse the doctrine on which that constitutional pro-

*298 vision rests, stated by Chief Justice Marshall * in that case, when he said, pages 135–6: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection." And, in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said, in *Marbury* v. *Madison,* 1 Cranch, 137, 163: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." . . .

*306 * The whole legislation, in all its parts, as to creditors affected by it and not consenting to it, must be pronounced null and void. Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the States and for all the people, both of the States separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power, as on account of the majesty of its authority and the justice of its mandates.

The judgment of the Hustings Court of the City of Richmond is accordingly reversed, and the cause will be remanded, with directions to render judgment upon the agreed statement of facts in favor of the plaintiff.

Mr. Justice Bradley, with whom concurred the Chief Justice, Mr. Justice Miller, and Mr. Justice Gray dissented.[1]

In Re Ayers.

Supreme Court of the United States, 1887.

[123 *United States,* 443.]

It is well settled in this court that, while the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error, or by appeal, yet, when a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had

[1] The dissenting opinion of Mr. Justice Bradley is omitted.—Editor.

no authority to make, the original order being void for want of jurisdiction, the order punishing for contempt is equally void; and if the proceeding for contempt result in imprisonment, this court will, by its writ of *habeas corpus,* discharge the prisoner.

Whether a State is the actual party defendant in a suit within the meaning of the 11th Amendment to the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not, in every case, by a reference to the nominal parties of the record. *Osborn* v. *Bank of the United States,* 9 *Wheat.* 738, 857, explained and limited.

In order to secure the manifest purpose of the constitutional exemption guaranteed by the 11th Amendment, it should be interpreted not literally and too narrowly, but with the breadth and largeness necessary to enable it to accomplish its purpose; and must be held to cover, not only suits brought against a State by name, but those against its officers, agents, and representatives, where the State, though not named, is the real party against which the relief is asked and the judgment will operate.

If a bill in equity be brought against the officers and agents of a State, the nominal defendants having no personal interest in the subject-matter of the suit, and defending only as representing the State, and the relief prayed for is a decree that the defendants may be ordered to do and perform certain acts which, when done, will constitute a performance of an alleged contract of the State, it is a suit against the State for the specific performance of the contract within the terms of the 11th Amendment to the Constitution, although the State may not be named as a defendant; and, conversely, a bill for an injunction against such officers and agents, to restrain and enjoin them from acts which it is alleged they threaten to do, in pursuance of a statute of the State,
*444 in its name, and for its use, * and which if done would constitute a breach on the part of the State of an alleged contract between it and the complainants, is in like manner a suit against the State within the meaning of that Amendment, although the state may not be named as a party defendant.

The court does not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.

A bill in equity was filed by aliens against the Auditor of the State of Virginia, its Attorney General, and various Commonwealth Attorneys for its counties, seeking to enjoin them from bringing and prosecuting suits in the name and for the use of the State, under the act of its General Assembly of May 12, 1887, against tax-payers reported to be delinquent, but who had tendered in payment of the taxes sought to be recovered in such suits, tax-receivable coupons cut from bonds of the State. An injunction having been granted according to the prayer of the bill, proceedings were taken against the Attorney General of the State and two Commonwealth Attorneys for contempt in disobeying the orders of the court in this respect, and they were fined and were committed until the fine should be paid and they should be purged of the contempt. *Held,* that the suit was a suit against the State of Virginia, within the meaning of the 11th Amendment to the Constitution of the United States, and was not within the jurisdiction of the courts of the United States; that the injunction granted by the Circuit Court was null and void; that the imprisonment of the officers of the State for an alleged contempt of the authority of the Circuit Court was illegal; and that the prisoners, being before this court on a writ of *habeas corpus,* should be discharged.

The Virginia act of 1877 concerning suits to collect taxes from persons who had tendered coupons in payment contains no provision as to the tender, or the proof of it, or the proof of the genuineness of the coupon, which violates legal or contract rights of the party sued.

> If the holder of Virginia coupons, receivable in payment of state taxes, sells them, agreeing with the purchaser that they shall be so received by the State, the refusal of the State to receive them constitutes no injury to him for which he could sue the State, even if it were suable; and cannot be made the foundation for preventive relief in equity against officers of the State. . . .

It appears that the State of Virginia, by acts of its legislature, approved March 30, 1871, March 28, 1879, authorized the issue of bonds bearing interest, and provided that the coupons thereof should be received by the State, in payment of taxes; that under these acts bonds to the value of several million dollars were issued; that by acts of 1882 the legislature of Virginia attempted to vary the terms and conditions upon which the bonds were issued, and the collectors of taxes were forbidden to receive them in payment of taxes due the State; that by an Act of May 12, 1887, it was provided that persons tendering payment of taxes in bonds which were not accepted as payment, should be sued by attorneys for the Commonwealth, and the Attorney General.

It further appears that on June 6, 1887, James P. Cooper, and others, subjects of Great Britain, and therefore aliens, filed a bill in the Circuit Court of the United States for the Eastern District of Virginia, to enjoin suit against them under the act of May 12, 1887; that in accordance with the prayer of the bill the said officials of the State of Virginia were enjoined; that notwithstanding the injunction of the Circuit Court of the United States for the Eastern District of Virginia, Rufus A. Ayers, the Attorney General of the State, began suit against the Baltimore & Ohio Railroad Company, under the act of May 12, 1887; that because thereof he was adjudged guilty of contempt of the court, fined five hundred dollars therefor, and committed to the custody of the Marshal of the court until the fine be paid and the suit be dismissed against the Baltimore & Ohio Railroad Company. John Scott, attorney for Fauquier County, and J. B. McCabe, attorney for Loudoun County, were likewise committed under similar circumstances.

Thereupon, upon motion of their counsel, a petition was filed for a writ of *habeas corpus,* which was allowed.

On a writ of *habeas corpus* directed to the Marshal of the United States for the Eastern District of Virginia, issued upon the application of Rufus A. Ayers, attorney general of the State of Virginia, the Marshal stated:

"that the petitioner whose body he produces was in his custody, and detained by him by virtue of an order, judgment, decree, and commitment of the Circuit Court of the United States for the Eastern District of Virginia, a certified copy of which is attached as a part of the return; and further returned that the petitioner had not paid, and refuses to pay the fine imposed upon him by said order."[1]

*485 * Mr. Justice Matthews . . . delivered the opinion of the court.

It is established by the decisions of this court, that while "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court," yet, when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no

[1] The above statement has been substituted for the much longer one contained in the official report.—Editor.

authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void;" and that, "when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus,* discharge the prisoner." *Ex parte Fisk,* 113 U. S. 713, 718. . . .

*486 * The question in the present case, therefore, is whether the order of the Circuit Court of June 6, 1887, forbidding the petitioners from bringing suits under the act of May 12, 1887, in the name and on behalf of the State of Virginia, as its attorneys, for the recovery of taxes, in payment of which the taxpayers had previously tendered tax-receivable coupons, is an order which that court had power by law to make. The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill are, by a final decree, per-

*487 petually to enjoin the defendants from taking any steps in * execution of the act of May 12, 1887. If the court had power, upon the case made in the record, to entertain the suit for that purpose, it had equal power, as a provisional remedy, to grant the restraining order, the violation of which constitutes the contempt adjudged against the petitioners.

The principal contention on the part of the petitioners is that the suit, nominally against them, is, in fact and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." On the other hand, it is contended by counsel for the complainants in that cause, who have argued against the discharge of the petitioners, that the suit is not within that prohibition.

It must be regarded as a settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record." *Poindexter* v. *Greenhow,* 114 U. S. 270, 287. This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 857. In his opinion in that case he said: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens." And the point as involved in that case was stated by Mr. Justice Swayne, delivering the opinion of the court in *Davis* v. *Gray,* 16 Wall. 203, 220, as follows: "In deciding

*488 who are parties to the suit the * court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to

be put in that relation to the case." But what was said by Chief Justice Marshall in *Osborn* v. *Bank of the United States, supra,* must be taken in connection with its immediate context, wherein he adds (page 858): "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." This conveys the intimation, that where the defendants who are sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject matter.

This, indeed, seems to be the interpretation put upon this language by Chief Justice Marshall himself in the opinion of the court, delivered by him in the case of *The Governor of Georgia* v. *Madrazo,* 1 Pet. 110, 123, 124. After quoting the paragraphs from the opinion in the case of *Osborn* v. *Bank of the United States,* above extracted, the Chief Justice mentioned the case of *Georgia* v. *Brailsford,* 2 Dall. 402, where the action was not in the name of the State, but was brought by the Governor in its behalf, and added: "If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this." He further said: "The claim upon the Governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appears to have been pronounced against *489 the successor of the original defendant; * as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." It was therefore held, in that case, that the State was in fact, though not in form, a party defendant to the suit, and that, consequently, the Circuit Court had no jurisdiction to pronounce the decree appealed from. See also *Ex parte Juan Madrazo,* 7 Pet. 627. This view was reiterated by this court in *Kentucky* v. *Dennison,* 24 How. 66, 98, where it was said to be settled, "that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant." Accordingly, in *Cunningham* v. *Macon & Brunswick Railroad Co.,* 109 U. S. 446, it was decided that in those cases where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then

arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.

The very question was presented in the cases of *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana,* 108 U. S. 76. In each of those cases there was upon the face of the record nominally a controversy between two States, which, according to the terms of the Constitution, was subject to the judicial
*490 power of the United States. So far as could be determined * by reference to the parties named in the record, the suits were within the jurisdiction of this court; but, on an examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof, who had transferred their claims to the State for the purposes of suit. It was accordingly unanimously held by this court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit. The Chief Justice, speaking for the court in that case, made a review of the circumstances which led to the adoption of the 11th Amendment, and, in concluding his opinion, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed." p. 91.

The converse of that case is to be found in *Hagood* v. *Southern,* 117 U. S. 52. There, the State of South Carolina, which was the party in interest, was not nominally a defendant. The nominal defendants were the Treasurer of the State of South Carolina, its Comptroller General, and the treasurers of its various counties and their successors in office. The object of the bills was to obtain on behalf of the complainants, by judicial process, the redemption by the State of certain scrip of which they were holders, according to the terms of a statute in pursuance of which it was issued, by the levy, collection, and appropriation of a special tax pledged to that purpose, as they claimed, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. The decrees of the Circuit Court granting the relief
*491 were reversed, and the cause remanded, with * instructions to dismiss the bills, on the ground that the suits, though nominally against the officers of the State, were really against the State itself. In its opinion this court said (page 67): "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed; the one required to perform the decree; and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in

the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the 11th Amendment to the Constitution of the United States."

The conclusions in the case of *Hagood* v. *Southern* were justified by what had previously been decided by this court in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz,* 107 U. S. 711. Those cases had for their object, one, by injunction, to restrain the officers of the State from executing the provisions of the act of the General Assembly alleged to be in violation of the contract rights of the plaintiffs, and the other, by mandamus, to require the appropriation of money from the treasury of the State in accordance with the contract. This relief, it was decided, was not within the competency of the judicial power. The Chief Justice said, on that point (page 727): "The remedy sought, in order to be complete, would require the court to assume all the executive author-
*492 ity * of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full; and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State."

It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record. . . .

*497 * The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. *New Jersey* v. *New York,* 5 Pet. 284, 288, 290; *Kentucky* v. *Dennison,* 24 How. 66, 96, 97; Rule 5 of 1884, 108 U. S. 574. If a decree could have been rendered enjoining the State from bringing suits against its tax-payers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz.,

the present defendants, its Attorney General, and the Commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents
*498 are personally subjected to the process of the * court, so as to forbid their acting in their behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?

It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the States from executing the provisions of state statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the sanction of this court; and that the present case is covered by their authority.

The principal authority relied upon to maintain this proposition is the judgment of this court in the case of *Osborn* v. *Bank of the United States,* 9 Wheat. 738.[1] . . .

*499 * There is nothing, therefore, in the judgment in that cause, as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that
*500 case, in the argument at the bar and in the * opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselves under the authority of a void act of the General Assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because the authority under which they professed to act was void.

In pursuance of the principles adjudged in the case of *Osborn* v. *Bank of the United States, supra,* it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be col-

[1] Mr. Justice Matthews here analyzed and quoted from the opinion of Mr. Chief Justice Marshall in the Osborn case, *ante,* p. 259. This portion of his opinion is therefore omitted. —Editor.

lected by seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The grounds of this jurisdiction were stated in *Allen* v. *Baltimore & Ohio Railroad Co.,* 114 U. S. 311. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. . . .

*502 * The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the acts of its General Assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted could not be brought. In *Hagood* v. *Southern,* 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily be

*503 a suit against the State. In such a case, though the State be * not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the Circuit Court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.

It may be asked what is the true ground of distinction, so far as the protection of the Constitution of the United States is invoked, between the contract rights of the complainant in such a suit, and other rights of person and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are

considered to be the acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the 11th Amendment, which secures to the State an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a State, the contract will be judicially recognized as of binding force, notwithstanding any subsequent law of the State impairing its obligation. But this right
*504 is incidental to * the judicial proceeding in the course of which the question concerning it arises. It is not a positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. Accordingly, it was held in *Carter* v. *Greenhow,* 114 U. S. 317, that no direct action for the denial of the right secured by a contract, other than upon the contract itself, would lie under any provisions of the statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States. In that case it was said (page 322): "How, and in what sense, are these rights secured to him by the Constitution of the United States? The answer is, by the provision of Article I, § 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are, nevertheless, passed by the legislature of a State, they are unconstitutional and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution." But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

*505 It cannot be doubted that the 11th Amendment to the Constitution * operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans,* 102 U. S. 203. That obligation, by virtue of the provision of Article I, § 10, of the Con-

stitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas,* 20 How. 527; *Railroad Co.* v. *Tennessee,* 101 U. S. 337. The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, * not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

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But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases, we repeat what was said by this court in *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541: "A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the

authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." An example and illustration of this class will be found in *Seibert* v. *Lewis,* 122 U. S. 284.

*507 * Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In contradistinction to these classes of cases, for the reasons given, we adjudge the suit of *Cooper and Others* v. *Marye and Others,* in which the injunctions were granted against the present petitioners, to be in substance and in law a suit against the State of Virginia. It is, therefore, within the prohibition of the 11th Amendment to the Constitution. By the terms of that provision, it is a case to which the judicial power of the United States does not extend. The Circuit Court was without jurisdiction to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders

*508 adjudging * them in contempt were equally void, and their imprisonment ment is without authority of law. It is therefore

Ordered that the petitioners be discharged.

Mr. Justice FIELD, concurring. . . .

Mr. Justice HARLAN, dissenting. . . .[1]

[1] The concurring opinion of Mr. Justice Field and the dissenting opinion of Mr. Justice Harlan are omitted.—Editor.

Hans v. State of Louisiana.

Supreme Court of the United States, 1889.

[134 *United States,* 1.]

A State cannot, without its consent, be sued in a Circuit Court of the United States by one of its own citizens, upon a suggestion that the case is one that arises under the Constitution and laws of the United States.

Chisholm v. Georgia, 2 Dall. 419, questioned.

While a State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void, and powerless to affect their enjoyment.

This was an action brought in the Circuit Court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an act of the legislature approved January 24, 1874. The bonds were known and designated as the "consolidated bonds of the State of Louisiana," and the coupons sued on are for interest which accrued January 1, 1880. The grounds of the action were stated in the petition as follows:

*2 "Your petitioner avers that by the issue of said bonds and * coupons said State contracted with and agreed to pay the bearer thereof the principal sum of said bonds forty years from the date thereof, to wit, the first day of January, 1874, and to pay the interest thereon represented by coupons as aforesaid, including the coupons held by your petitioner, semi-annually upon the maturity of said coupons; and said legislature, by an act approved January 24, 1874, proposed an amendment to the constitution of said State, which was afterwards duly adopted, and is as follows, to wit:

" 'No. 1. The issue of consolidated bonds, authorized by the general assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury.'

"And petitioner further avers that, notwithstanding said solemn compact with the holders of said bonds, said State hath refused and still refuses to pay said coupons held by petitioner, and by its constitution, adopted in 1879, ordained as follows:

" 'That the coupons of said consolidated bonds falling due the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to

meet said coupons are hereby transferred to defray the expenses of the state government;' and by article 257 of said constitution also prescribed that 'the constitution of this state, adopted in eighteen hundred and sixty-eight,
*3 and all amendments thereto, is declared * to be superseded by this constitution;' and said State thereby undertook to repudiate contract obligations aforesaid and to prohibit her officers and agents executing the same, and said State claims that, by said provisions of said constitution, she is relieved from the obligations of her aforesaid contract and from the payment of said coupons held by petitioner, and so refuses payment thereof and had prohibited her officers and agents making such payment.

"Petitioner also avers that taxes for the payment of the interest upon said bonds, due January 1, 1880, were levied, assessed and collected, but said State unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the State, and has made no other provision for the payment of said interest.

"Petitioner also avers that said provisions of said constitution are in contravention of said contract, and their adoption was an active violation thereof, and that said State thereby sought to impair the validity thereof with your petitioner in violation of article 1, section 10, of the Constitution of the United States, and the effect so given to said state constitution does impair said contract.

"Wherefore petitioner prays that the State of Louisiana be cited to answer this demand, and that after due proceedings she be condemned to pay your petitioner said sum of ($87,500) eighty-seven thousand five hundred dollars, with legal interest from January 1, 1880, until paid, and all costs of suit; and petitioner prays for general relief."

A citation being issued, directed to the State, and served upon the governor thereof, the attorney general of the State filed an exception, of which the following is a copy, to wit:

"Now comes defendant, by the attorney general, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personæ*. Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state, and its jurisdiction is respectfully declined.

"Wherefore respondent prays to be hence dismissed, with costs and for general relief."

*4 * By the judgment of the court this exception was sustained, and the suit was dismissed. See *Hans* v. *Louisiana,* 24 Fed. Rep. 55. To this judgment the present writ of error was brought. . . .

*9 * Mr. Justice Bradley, after stating the case as above, delivered the opinion of the court.

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing,

if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a
*10 State and its own * citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana* v. *Jumel,* 107 U. S. 711; *Hagood* v. *Southern,* 117 U. S. 52; *In re Ayers,* 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the neces-
*11 sary * consequence of the language of the Constitution and the law, the

result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm* v. *Georgia,* 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall *not be construed to extend* to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney General Lee, in the case of *Hollingsworth* v. *Virginia,* 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" *Tilghman* and *Rawle* argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state."

*12 * This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm* v. *Georgia;* and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in *Chisholm* v.

Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the Federalist, written by Hamilton, has the following profound remarks:

"It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations proved to be without foundation:

*13 * "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might

*14 be so; and so, in fact, the Supreme Court held in *Chisholm* v. * *Georgia;* but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia convention the same objec-

tions were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the state courts. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2d ed. 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." Ib. 555.

It seems to us that these views of those great advocates and defenders
*15 of the Constitution were most sensible and just; and * they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other States, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary

from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 288, 289, and cases there cited.

*16 * The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia;* and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Davis* v. *Gray,* 16 Wall. 203; *Board of Liquidation* v. *McComb,* 92 U. S. 531; *United States* v. *Lee,* 106 U. S. 196; *Poindexter* v. *Greenhow,* 109 U. S. 63; *Virginia Coupon Cases,* 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co., of October 16, 1839. Works, Vol. VI, 537, 539. "The security for state loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

In *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

*17 * "It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad,* 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas, et al.,* 15 How. 304, 309, and in *Clark* v. *Barnard,* 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the constitution of that state. But this court decided, in *Beers et al.* v. *Arkansas,* 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the constitution prohibiting the passage of state laws impairing the obligation of

a contract. In that case the law allowing the State to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further
*18 provisions were * necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in *Railroad Company* v. *Tennessee,* 101 U. S. 337, 339; *Railroad Company* v. *Alabama,* 101 U. S. 832; and *In re Ayers,* 123 U. S. 443, 505.

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," etc.—"Concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in *Chisholm* v. *Georgia,* and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of
*19 history and the reason of the thing, we * think we are at liberty to prefer Justice Iredell's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief

Justice Marshall, in *Cohens* v. *Virginia,* 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. "Where," said the Chief Justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far reëxamined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the
*20 United States; that the judiciary act does not authorize such suits. * Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign state," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial,* and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its con-
*21 tracts, * may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is

Affirmed.

Mr. Justice Harlan concurring.

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm* v. *Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.[1]

[1] At the same term the Supreme Court held in the case of *North Carolina* v. *Temple* (134 U. S. 22, 30) per Mr. Justice Bradley:

"We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this regard it comes within the principle of the cases of *Louisiana* v. *Jumel* (107 U. S. 711); *Cunningham* v. *Macon & Brunswick Railroad Co.* (109 U. S. 446); *Hagood* v. *Southern* (117 U. S. 52); and *in re Ayers* (123 U. S. 443). We do not think it necessary to consider that question anew.

"The other point, the suability of the State, is settled by the decision just rendered in *Hans* v. *The State of Louisiana, ante,* 1."

See also *Louisiana ex rel. The New York Guaranty and Indemnity Company* v. *Steele* (134 U. S. 230), decided in 1890, in which the suit against the auditor in his official capacity, in order to compel him to raise a tax authorized by a former law but contrary to subsequent legislation and to the present laws of the State, was held to be a suit against the State.

For a further application of the principle laid down in the principal case see *Smith* v. *Reeves* (178 U. S. 436), decided in 1900.—Editor.

Ex parte Young.

Supreme Court of the United States, 1907.

[209 *United States,* 123.]

While this court will not take jurisdiction if it should not, it must take jurisdiction if it should. It cannot, as the legislature may, avoid meeting a measure because it desires so to do.

In this case a suit by a stockholder against a corporation to enjoin the directors and officers from complying with the provisions of a state statute, alleged to be unconstitutional, was properly brought within Equity Rule 94 of this court.

An order of the Circuit Court committing one for contempt for violation of a decree of which it did not have jurisdiction is unlawful; and, in such case, upon proper application, this court will discharge the person so held. . . .

*124 * A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed; it is within the jurisdiction, and is the duty, of the Circuit Court to inquire whether such rates are so low as to be confiscatory, and if so to permanently enjoin the railroad company, at the suit of one of its stockholders, from putting them in force, and it has power pending such inquiry to grant a temporary injunction to the same effect.

While there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction and denies them the equal protection of the law.

The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.

When the question of the validity of a state statute with reference to the Federal Constitution has been first raised in a Federal court that court has the right to decide it to the exclusion of all other courts.

It is not necessary that the duty of a state officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it; if by virtue of his office he has some connection with the enforcement of the act it is immaterial whether it arises by common general law or by statute.

*125 * While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion.

The Attorney General of the State of Minnesota, under his common law power and the state statutes, has the general authority imposed upon him of enforcing constitutional statutes of the State and is a proper party defendant to a suit brought to prevent the enforcement of a state statute on the ground of its unconstitutionality. . . .

While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who

threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional state statute may be enjoined from so doing by a Federal court.

Under such conditions as are involved in this case the Federal court may enjoin an individual or a state officer from enforcing a state statute on account of its unconstitutionality, but it may not restrain the state court from acting in any case brought before it either of a civil or criminal nature, or prevent any investigation or action by a grand jury.

An injunction by a Federal court against a state court would violate the whole scheme of this Government, and it does not follow that because an individual may be enjoined from doing certain things a court may be similarly enjoined.

No adequate remedy at law, sufficient to prevent a court of equity from acting, exists in a case where the enforcement of an unconstitutional state rate statute would require the complainant to carry merchandise at confiscatory rates if it complied with the statute and subject it to excessive penalties in case it did not comply therewith and its validity was finally sustained.

While a common carrier sued at common law for penalties under, on on indictment for violation of, a state rate statute might interpose as a defense the unconstitutionality of the statute on account of the confiscatory character of the rates prescribed, a jury cannot intelligently pass upon such a matter; the proper method is to determine the constitutionality of the statute in a court of equity in which the opinions of experts
*126 may be * taken and the matter referred to a master to make the needed computations and to find the necessary facts on which the court may act. . . .

The railroad interests of this country are of great magnitude, and the thousands of persons interested therein are entitled to protection from the laws and from the courts equally with the owners of all other kinds of property, and the courts having jurisdiction, whether Federal or state, should at all times be open to them, and where there is no adequate remedy at law the proper course to protect their rights is by suit in equity in which all interested parties are made defendants.

While injunctions against the enforcement of a state rate statute should not be granted by a Federal court except in a case reasonably free from doubt, the equity jurisdiction of the Federal court has been constantly exercised for such purpose.

The Circuit Court of the United States having, in an action brought by a stockholder of the Northern Pacific Railway Company against the officers of the road, certain shippers and the Attorney General and certain other officials of the State of Minnesota, held that a railroad rate statute of Minnesota was unconstitutional and enjoined all the defendants from enforcing such statute, and the Attorney General having refused to comply with such order, the Circuit Court fined and committed him for contempt, and this court refused to discharge him on *habeas corpus*. . . .

The State of Minnesota created a railroad and warehouse commission, which, on September 6, 1906, reduced the rates to be charged by railroad companies in the carriage of merchandise between stations within that State.

The railroad companies complied with the order of the commission, reducing the rates.

Failure to comply with the laws of Minnesota and the orders of the commission were, by the revised laws of Minnesota, of 1905, punishable by a fine of not less than two thousand five hundred dollars, nor more than five thousand dollars for the first offense, and not less than five thousand dollars nor more than ten thousand dollars for each subsequent offense.

On April 4, 1907, the State of Minnesota passed an act fixing 2 cents a mile, instead of 3 cents as previously allowed, as the maximum passenger rate to be charged by railroads in Minnesota.

The railroads complied with this statute.

A violation of any of the provisions of this act subjected the railroad company to a fine not exceeding five thousand dollars, and any officer, agent, or representative thereof so violating the act, to such a fine, or imprisonment in the State prison for a period not exceeding five years, or both such fine and imprisonment.

An act of the legislature, of April 18, 1907, was, however, not obeyed by the railroad companies, and the failure to comply with the provisions of this act led to the proceedings culminating in the present case.

Rates between stations in the State were fixed for the transportation of certain commodities divided into seven classes, and a schedule of a maximum rate was set forth in the act.

Section 5 of the act provided that the orders made by the railroad and warehouse commission prescribing rates should be the exclusive legal maximum rate for the transportation of the commodities enumerated in the act, between points within that State.

Section 6 directed that every railroad company in the State should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager or agent or employee of such railroad company should cause the adoption, publication and use by such railroad company of rates not exceeding those specified in the act; "and any officer, director or such agent or employee of any such railroad company who violates any of the provisions of this section, or who causes or counsels, advises or assists any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor, and may be prosecuted therefor in any county into which its railroad extends, and in which it has a station, and upon a conviction thereof be punished by imprisonment in the county jail for a period not exceeding ninety days." The act was to take effect June 1, 1907.

The railroad companies did not obey the provisions of this act so far as concerned the adoption and publication of rates as specified therein.

Of the nine suits begun on May 31, 1907, the day before the act was to take effect, one was brought by Charles E. Perkins, of Iowa, and David C. Shepard, of Minnesota, as complainants and stockholders against the Northern Pacific Railway Company, a corporation organized under the laws of Wisconsin, in which Edward T. Young, Attorney General of the State, and others, were parties defendant.

The bill contained the statement that the acts of the State of Minnesota were confiscatory; that the nature and extent of the penalties imposed for disobedience made it impossible for the railroad companies to bring suit in court in order to test their validity; that if the railroad company should fail to obey the orders of the commission or the provisions of the acts of April 4 and April 18, 1907, Edward T. Young, as Attorney General of Minnesota, would institute proceedings of mandamus, or otherwise, against the railroad company, to enforce the orders and their provisions and to subject the railways and their officers to the penalties imposed by the statutes. Therefore, the bill asked an injunction against such action on the part of the defendant, Young, and the railroad commission.

The Circuit Court of the United States for the District of Minnesota, in

which these bills were filed, restrained the railroad company from complying with the provisions of the act of April 18, 1907, and enjoined Edward T. Young from taking any steps against the railroads to enforce the remedy and penalties specified in that act.

Young, on behalf of Minnesota, appeared for the purpose of moving that the bill be dismissed as against him, as a suit against him as Attorney General was a suit against the State, forbidden by the Eleventh Amendment. He also demurred to the bill on the same grounds stated in the motion to dismiss, but the motion was denied and the demurrer overruled.

After hearing all of the parties and proof taken in regard to the issues involved, the court, on September 23, 1907, ordered a temporary injunction against the railway company, restraining it pending the final hearing of the cause, from putting into effect the tariffs, rates, or charges set forth in the act approved April 18, 1907. And the defendant, Young, as Attorney General, was enjoined pending the final hearing of the cause, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the act above mentioned, or to compel obedience or compliance with its terms.

On September 24, 1907, the day following the preliminary injunction against him as Attorney General, Young began mandamus proceedings against the Northern Pacific Railway Company, to compel it to comply with the provisions of the act of April 18, 1907.

Because of the institution of this suit, Young was ordered to show cause why he should not be punished for contempt. This he did, alleging that the action of the court in enjoining him as Attorney General from performing his discretionary official duties, was in conflict with the Eleventh Amendment of the Constitution of the United States, as interpreted and applied by the Supreme Court of the United States, and that without disrepect to the court, he believed it to be his duty as Attorney General, to commence mandamus proceedings for, and in behalf of the State. Thereupon, he was adjudged guilty of contempt, fined the sum of one hundred dollars; and directed to dismiss the mandamus proceedings and to stand committed to the custody of the marshal until that order was obeyed. Whereupon, an original application was made to the Supreme Court for writs of *habeas corpus* and *certiorari* in behalf of Edward T. Young, as Attorney General for the State of Minnesota.[1]

*142 Mr. Justice Peckham . . . delivered the opinion of the court.

We recognize and appreciate to the fullest extent the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of the courts of justice throughout the land, both Federal and state, and in the proper exercise of the jurisdiction of the Federal courts, as limited and controlled by the Federal Constitution and the laws of Congress.

That there has been room for difference of opinion with regard to such limitations the reported cases in this court bear conclusive testimony. It cannot be stated that the case before us is entirely free from any possible doubt nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide.

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[1] The above statement is substituted for the longer one contained in the official report of the case.—Editor.

The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 404, is most apposite. In that case he said:

*143 * "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

Coming to a consideration of the case, we find that the complainants in the suit commenced in the Circuit Court were stockholders in the Northern Pacific Railway Company, and the reason for commencing it and making the railroad company one of the parties defendant is sufficiently set forth in the bill. *Davis &c. Co.* v. *Los Angeles,* 189 U. S. 207, 220; Equity Rule 94, Supreme Court. . . .

*145 * Coming to the inquiry regarding the alleged invalidity of the acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employés of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible, for the company to obtain officers, agents or employés willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order

*146 to test the validity of the acts, must find some * agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . .

*147 * A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may

be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much
*148 it is not now * necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the Circuit Court had jurisdiction under the cases already cited (and it was therefore its duty) to inquire whether the rates permitted by these acts or orders were too low and therefore confiscatory, and if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect.

Various affidavits were received upon the hearing before the court prior to the granting of the temporary injunction, and the hearing itself was, as appears from the opinion, full and deliberate, and the fact was found that the rates
*149 fixed by the commodity act, under the circumstances existing with * reference to the passenger rate act and the orders of the Commission, were not sufficient to be compensatory, and were in fact confiscatory, and the act was therefore unconstitutional. The injunction was thereupon granted with reference to the enforcement of the commodity act.

We have, therefore, upon this record the case of an unconstitutional act

of the state legislature and an intention by the Attorney General of the State to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employés and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and pending its solution obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings.

This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the State. This objection is to be considered with reference to the Eleventh and Fourteenth Amendments to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

*150 * The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter Amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans* v. *Louisiana,* 134 U. S. 1. It was adopted after the decision of this court in *Chisholm* v. *Georgia* (1793), 2 Dall. 419, where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among them being *Osborn* v. *United States Bank* (1824), 9 Wheat. 738, 846, 857, which held that the Amendment applied only to those suits in which the State was a party on the record. In the subsequent case of *Governor of Georgia* v. *Madrazo* (1828), 1 Pet. 110, 122, 123, that holding was somewhat enlarged, and Chief Justice Marshall, delivering the opinion of the court, while citing *Osborn* v. *United States Bank, supra,* said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in possession of the state government), the State might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

Davis v. *Gray,* 16 Wall 203, 220, reiterates the rule of *Osborn* v. *United States Bank,* so far as concerns the right to enjoin a state officer from
*151 executing a state law in conflict with * the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

In *Virginia Coupon Cases,* 114 U. S. 270, 296 (*Poindexter* v. *Greenhow*), it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes, and, under color of a void law, was about to seize and sell the property of a taxpayer for non-payment of his taxes, was a suit against him personally as a wrongdoer and not against the State.

Hagood v. *Southern,* 117 U. S. 52, 67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the State was not in name made a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

The cases upon the subject were reviewed, and it was held, *In re Ayers,* 123 U. S. 443, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance by the State of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood* v. *Southern, supra.*

A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

On the other hand, *United States* v. *Lee,* 106 U. S. 196, determined that an individual in possession of real estate under the Government of the United
*152 States, which claimed to be * its owner, was, nevertheless, properly sued by the plaintiff, as owner, to recover possession, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindel* v. *Wesley,* 167 U. S. 204, to the same effect.

In *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 9, a suit against land commissioners of the State was said not to be against the State, although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainants' contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborn* v. *United States Bank, supra,* was cited, and it was stated: "But the general doctrine of *Osborn* v. *Bank of the United States,* that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. The same principle is decided in *Scott* v. *Donald,* 165 U. S. 58, 67. And see *Missouri, &c.,* v. *Missouri Railroad Commissioner,* 183 U. S. 53.

The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayres Case,* 123 U. S. (*supra*), was to restrain the state officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the name of the State and brought to *recover taxes for its use,* on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain
*153 such a suit, it would have power to grant the restraining order * preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (a rate case), was a suit against the members of a railroad commission (created under an act of the State of Texas) and the Attorney General all of whom were held suable, and that such suit was not one against the State. The Commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the Commission under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the Commission as defendant. This court held that such language permitted a suit in the United States Circuit Court for the Western District of Texas, which embraced Travis County, but it also held that, irrespective of that consent, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and therefore not prohibited under the amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable, whether that jurisdiction was rested (page 393), "upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States." Each of these grounds is effective and both
*154 are of equal force. * *Union Pacific, &c.,* v. *Mason City Company,* 199 U. S. 160, 166.

In *Smyth* v. *Ames,* 169 U. S. 466 (another rate case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the Amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: "It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to

the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment." The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on account of the rates being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment.

There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers he had authority to ask for a mandamus to enforce such or any other law. *State of Nebraska ex rel. &c.* v. *The Fremont &c. Railroad Co.,* 22 Nebraska, 313.

The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual state officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

*155 * This decision was reaffirmed in *Prout* v. *Starr,* 188 U. S. 537, 542. . . .

The various authorities we have referred to furnish ample justification *156 for the assertion that individuals, who, as officers * of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action. . . .

*157 * In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officers must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists. . . .

*158 * It is also objected that as the statute does not specifically make it the duty of the Attorney General (assuming he has that general right) to enforce it, he has under such circumstances a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion.

In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses

or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial. duty. *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541.

*159 * The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the State in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the offi-

*160 cer in proceeding under such enactment comes into conflict with the * superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *In re Ayers, supra,* page 507. It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

The question remains whether the Attorney General had, by the law of the State, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the injunction issued, at the risk of being found guilty of contempt by so doing.

The duties of the Attorney General, as decided by the Supreme Court of the State of Minnesota, are created partly by statute and exist partly as at common law. . . .

*161 * It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court. . . .

*163 * It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former.

It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

Another obstacle to making the test on the part of the company might
*164 be to find an agent or employé who would disobey * the law, with a possible fine and imprisonment staring him in the face if the act should be held valid. Take the passenger rate act, for instance: A sale of a single ticket above the price mentioned in that act might subject the ticket agent to a charge of felony, and upon conviction to a fine of five thousand dollars and imprisonment for five years. It is true the company might pay the fine, but the imprisonment the agent would have to suffer personally. It would not be wonderful if, under such circumstances, there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk. . . .

*165 * To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in

this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property, owned by many thousands of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.

All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question. . . .

*166 * Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reason-

*167 ably free from doubt. We * think such rule is, and will be, followed by all the judges of the Federal courts.

And, again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn* v. *United States Bank* up to the present; the only difference in regard to the case of Osborn and the case in hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn case,* an actual and direct trespass upon or interference with tangible property. A bill filed to prevent the commencement of suits to enforce an unconstitutional act, under the circumstances already mentioned, is no new invention, as we have already seen. The difference between an actual and direct interference, with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, when the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from responsibility to the supreme authority of the United States. See *in re Ayres,* 123 U. S. 507.

This supreme authority, which arises from the specific provisions of the Constitution itself, is nowhere more fully illustrated than in the series of

*168 decisions under the Federal *habeas * corpus* statute (§ 753, Rev. Stat.), in some of which cases persons in the custody of state officers for alleged

crimes against the State have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the State by reason of serving the writ upon one of the officers of the State in whose custody the person was found. In some of the cases the writ has been refused as matter of discretion, but in others it has been granted, while the power has been fully recognized in all. *Ex Parte Royall,* 117 U. S. 241; *In re Loney,* 134 U. S. 372; *In re Neagle,* 135 U. S. 1; *Baker* v. *Grice,* 169 U. S. 284; *Ohio* v. *Thomas,* 173 U. S. 276; *Minnesota* v. *Brundage,* 180 U. S., 499, 502; *Reid* v. *Jones,* 187 U. S. 153; *United States* v. *Lewis,* 200 U. S. 1; *In re Lincoln,* 202 U. S. 178; *Urquhart* v. *Brown,* 205 U. S. 179.

It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the State by virtue of service of the writ on the state officer in whose custody he is found, is not a suit against the State, and yet service of a writ on the Attorney General to prevent his enforcing an unconstitutional enactment of a state legislature is a suit against the State.

There is nothing in the case before us that ought properly to breed hostility to the customary operation of Federal courts of justice in cases of this character.

The rule to show cause is discharged and the petition for writs of *habeas corpus* and certiorari is dismissed.

So ordered.

Mr. Justice Harlan, dissenting. . . .[1]

[1] The elaborate dissenting opinion of Mr. Justice Harlan is omitted.—Editor.

VII

CONTROVERSIES BETWEEN STATES.

Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution it was ordained that this judicial power, in cases where a state was a party, should be exercised by this Court as one of original jurisdiction. The states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified. (*Mr. Justice Baldwin in Rhode Island* v. *Massachusetts, 12 Peters, 657, 720, decided in 1838.*)

Our next inquiry will be, whether we have jurisdiction of the subject matters of the suit, to hear and determine them.

That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. (*Mr. Justice Baldwin in Rhode Island* v. *Massachusetts, 12 Peters, 657, 721, decided in 1838.*)

The founders of our government could not but know, what has ever been and is familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them. . . . None can be settled without war or treaty, which is by political power; but under the old and new confederacy they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary; a court, or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one to be decided by the sic volo, sic jubeo, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires. . . .

These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation; the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the equum et bonum of the case, let who or what be the parties before them. (*Mr. Justice Baldwin in Rhode Island* v. *Massachusetts, 12 Peters, 657, 736–738, decided in 1838.*)

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquility, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a

controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them. . . .

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. . . .

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our Government, State or National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the General Government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the power of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force. (*Chief Justice Taney in Ableman* v. *Booth, 21 Howard, 506, 519–521, decided in 1858.*)

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri* v. *Illinois,* 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. (*Mr. Justice Brewer in Kansas* v. *Colorado, 206 United States, 46, 97–8, decided in 1907.*)

So that the practice seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed ex parte. (*Mr. Justice Thompson in Massachusetts* v. *Rhode Island, 12 Peters, 755, 761, decided in 1838.*)

From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. . . . But a case like this, and one too of so many years standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual. Agents must be employed, and much time may be required to search for historical documents, and to arrange and collate them, for the purpose of presenting to the Court the true grounds of the defence. (*Chief Justice Taney in Rhode Island* v. *Massachusetts, 13 Peters, 23, 24–5, decided in 1839.*)

The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice and we have no precedents to guide us in the forms and modes of proceedings, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing. The subject was however fully considered at January term, 1838. . . . It was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. . . .

Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned are too great, to be decided upon the mere technical principles of Chancery pleading. (*Chief Justice Taney in Rhode Island* v. *Massachusetts, 14 Peters, 210, 256–7, decided in 1840.*)

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him. (*Chief Justice Taney in Kentucky* v. *Dennison, Governor of Ohio, 24 Howard, 66, 109–10, decided in 1860.*)

The opinions referred to will make it clear that both States were afforded the amplest opportunity to be heard and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the States to urge the very merits of every subject deemed by them to be material. And, controlled by a like purpose, before coming to discharge our duty in the matter now before us, we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment and hence has led to the proceeding to enforce the judgment which is now before us. (*Chief Justice White in Virginia* v. *West Virginia, 246 United States, 565, 590, decided in 1918.*)

That judicial power essentially involves the right to enforce the results of its exertion is elementary. . . . And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute. (*Chief Justice White in Virginia* v. *West Virginia, 246 United States, 565, 591–2, decided in 1918.*)

The Colony of Rhode Island v. The Colony of Connecticut.

Privy Council, 1727.

[3 *Acts of the Privy Council, Colonial Series,* 10.][1]

A controversy between colonies concerning the boundaries between them as set forth in their respective charters is a judicial question, to be determined by the King in Council at the request of the colonies.

The boundary line between Rhode Island and Connecticut, many years in dispute, was submitted to the King in Council and determined in accordance with an agreement of 1703 between commissioners of the colonies appointed in October, 1702, for settling their boundaries.

January 3, 1721. [Reference to the Committee for Appeals of the petition of Joseph Jenks and Richard Partridge, agents for Rhode Island, that the boundary with Connecticut be confirmed according to their Charter and agreeable to a line run by Commissioners sent over in 1664 to settle the same.]

February 20, 1721. [Committee. The petitioners having been heard, Mr. Dummer, agent for Connecticut, is ordered to return his answer in writing by 27 Feb.: the whole matter to be heard at the first meeting of the Committee after Midsummer.]

January 16, 1722. [Committee. Counsel on both sides having been heard, the Committee resolve to delay till 20 Jan. when Mr. Popple, Secretary to the Board of Trade, is to produce from their Office an old report relating to these boundaries.]

January 17, 1722. [Committee refer the matter for a report to the Board of Trade.]

July 17, 1723. [Committee.] Upon reading this day at the Board, a Report from the Lords Commissioners of Trade and Plantations Dated the 22nd of March[2] 1723 pursuant to an order of this Committee of the 19th of January[1] 1722 Referring to the said Lords Commissioners the Petition of the Agents of Rhode Island about settling the Boundarys between them and Connecticut, to-
*11 gether with the Answer of the Agent of * Connecticut thereto, and their Lordships observing by the said Report that the Matter in Dispute has already lasted Sixty Years and may unless the Royall authority Interpose, be perpetual, to the Great Disturbance of the Peace of these Colonys and to the utter discouragement of Planting and Settling the Lands in Dispute, and that it were to be wished they would both Voluntarily Submit themselves to His

[1] The volume from which this case is taken was issued by the British Government in 1910 and the text is given as there printed.

By "Committee" is to be understood the Committee for Hearing Appeals from the Plantations.

It may be said in this connection, although it will appear in the report of the next succeeding case of *Rhode Island* v. *Massachusetts,* that a controversy of this kind was, in ordinary course, laid before the Privy Council, by it referred to the Committee for Hearing Appeals from the Plantations, and by this body to the Lords Commissioners of Trade and Plantations for examination and report, which heard the agents and counsel of plaintiff and defendant, examined and weighed the evidence submitted by each, and reported its recommendations to the Committee for Hearing Appeals. This body, consisting of a committee of the whole of the Privy Council, passed upon the recommendations of the commissioners, and its conclusions were, as a matter of course and in the form of a decree, approved by the King in Council.—Editor.

Majestys immediate Government, as some other Colonies have done, and that they might be annexed to the Province of New Hampshire. The Lords of the Committee, are therefore pleased to order that the said Report Be Referred back to the said Lords Commissioners of Trade and Plantation to Reconsider the same; and to call before them the said Agents and to Enquire of them whether the said Provinces are willing to Submitt themselves to His Majestys immediate Government as the most effectuall means to put an end to the Disputes between them, And that in Case the said Agents shall not be impowered to make any proposals of this kind, they be Directed to Write to their principals in order to their being sufficiently authorized and Instructed upon this Head, and the said Lords Commissioners of Trade are to make Report thereof to this Board. . . .

August 2, 1726. [The Committee agree to report,] That on the 17th
*12 of March 1643 a Grant was made by the Earl of Warwick and * others at that time appointed Commissioners by the Parliament for the Government and regulation of the Plantations to the people of Rhode Island and Providence Plantations of a Tract of Land bounded as follows (Vizt. North and North East on the Patent of Massachusetts, East and South East on Plymouth Patent, South on the Ocean and on the West and North West Inhabited by Indians called Narroganneuchs alias Narragansetts, the whole Tract extending about Twenty five English Miles into the Poquet River and Country, which Instrument tho' it cannot be reputed valid in Law yet in some measure is on Evidence of what was reputed to be the Boundary of the Province.

That after the Restoration Application was made to His Majesty King Charles the 2nd by the Agents of Connecticut and Rhode Island for Charters to fix the respective Governments and Boundaries of the said Provinces and Charters were accordingly Granted for that purpose.

But the Charter for Connecticut being obtained previous to that of Rhode Island and Providence Plantations, the Boundaries of Connecticut were endeavoured to be fixed to their advantage.

The said Charter for Connecticut bears date the 23rd of April 1662, and their Bounds are described in the following manner (Vizt.) All that part of our Dominions in New England in America bounded on the East by Narraganset River commonly called Narraganset Bay where the said River falleth into the Sea and on the North by the Line of the Massachusetts Plantation, and on the South by the Sea, and in Longitude as the Line of the Massachusetts Colony running from East to West (that is to say) from the said Narraganset Bay on the East to the South Sea on the West part with the Islands thereunto adjoyning together with all firm Lands, Soils, Grounds, &c.

That the people of Rhode Island and Providence Plantations apprehending that the said Connecticut Charter so bounded might justly swallow up part
*13 of their Territories and Cut of * all their pretensions to any thing upon the Continent, This Grievance they complained off soon after the said Charter was obtained and it doth happen

That John Winthrop and John Clark then agents for the respective Colonys of Connecticut and Rhode Island and Providence Plantations (Notwithstanding the said Charter of Connecticut) Did in April 1663 Submit to Arbitration what should be the Boundaries between the said Colonys, And it appears.

That the Charter which was afterwards Granted to Rhode Island in the

15th year of Charles the 2nd takes Notice of the aforesaid arbitration and hath fixed their Boundaries in the following manner (Vizt.) All that part of our Dominions in New England in America containing the Nahhautick Nanghiggansit alias Narragaset Bay and country and parts adjacent bounded on the West or Westerly by the Middle or Channel of a River there commonly known by the Name of pacatuck alias pawcatuck River and so along the said River as the greater or Middle stream thereof reacheth or lies up into the Country Northward into the Head thereof, and from thence by a strait Line drawn due North until it meet with the South Line of the Massachusetts Colony and on the North or Northerly by the aforesaid South or Southerly Line of the Massachusetts Colony or Plantation and extending towards the East or Easterly 3 English Miles, to the East or North East of the most Eastern or North Eastern parts of the aforesaid Narragansetts Bay, as the said Bay lies or extendeth itself from the Ocean on the South or Southerly unto the Mouth of the River which runneth towards the Town of Providence and from thence along the Easterly side or Bank of the said River higher called by the Name of Seacunk River into the ffalls called patuckett ffalls being the most Northerly Line of Plymouth Colony, and so from the said ffalls into a Strait Line due North untill it meet with the aforesaid Line of the Massachusetts Colony, and bounded on the South by the Ocean, and in particular the Lands belonging to the Town of Providence, Patuxet, War-
*14 wick Misquammacock alias * Pawcatuck and the rest upon the main Land in the Tract aforesaid together with Rhode Island, Block Island and all the rest of the Islands and Banks in the Narroganset Bay and bordering upon the Coast of the Tract aforesaid, Fishers Island only excepted, together with all ffirm Lands Soils &c. and further the said Charter directs that the River Pawcatuck shall at all times thereafter be called and deemed to be the Narroganset River mentioned for a Boundary in the Charter to Connecticut

From which pretended Grant of the Earl of Warwick and others to Rhode Island and Providence Plantation as also from the Submission of the Boundaries to arbitration by the agents of both Colonys so soon after the Charter for Connecticut had been obtained, and by the Charter to Rhode Island and Providence Plantations, It appears,

That King Charles the Second was surprized in his Grant to Connecticut as to the Boundaries and that such arbitration and Subsequent Charter was intended to Redress the Greviance complained off by Rhode Island and Providence Plantation, It also appears,

That so lately as in 1703 by agreement between Commissioners appointed in October 1702 in behalf of the said Colonys respectively for settling their Boundarys it was agreed, That the Western Boundary between Rhode Island and providence Plantation and Connecticut should for the future be formed by a Line to be drawn from the Mouth of Asshaway River where it falls into Pawcatuck River and thence extending North to the South Line of the Massachusetts Bay which Line is particularly described on the Map hereunto annexed —And it also appears,

That the Commissioners of Connecticut did actually meet and concur with those of Rhode Island in drawing the said Line as a Boundary between the two Colonys and which Line is particularly described in Green on the said Mapp hereunto annexed.

And by the said appointment of the General Assembly of Connecticut
*15 in October 1702 It plainly appears the General * Assembly of Connecticut approved of the said Arbitration of their Agent Winthrop in 1663, They expressly providing in the said Instrument, That nothing to be done by these Commissioners shall alter or change the property of any persons Lands, But that property shall be saved according to the Agreement of their late Agent John Winthrop made in the year 1663, with Mr. Clark agent for Rhode Island—which is a strong proof that the Government of Connecticut apprehended the pretensions of Rhode Island were just and Equitable.

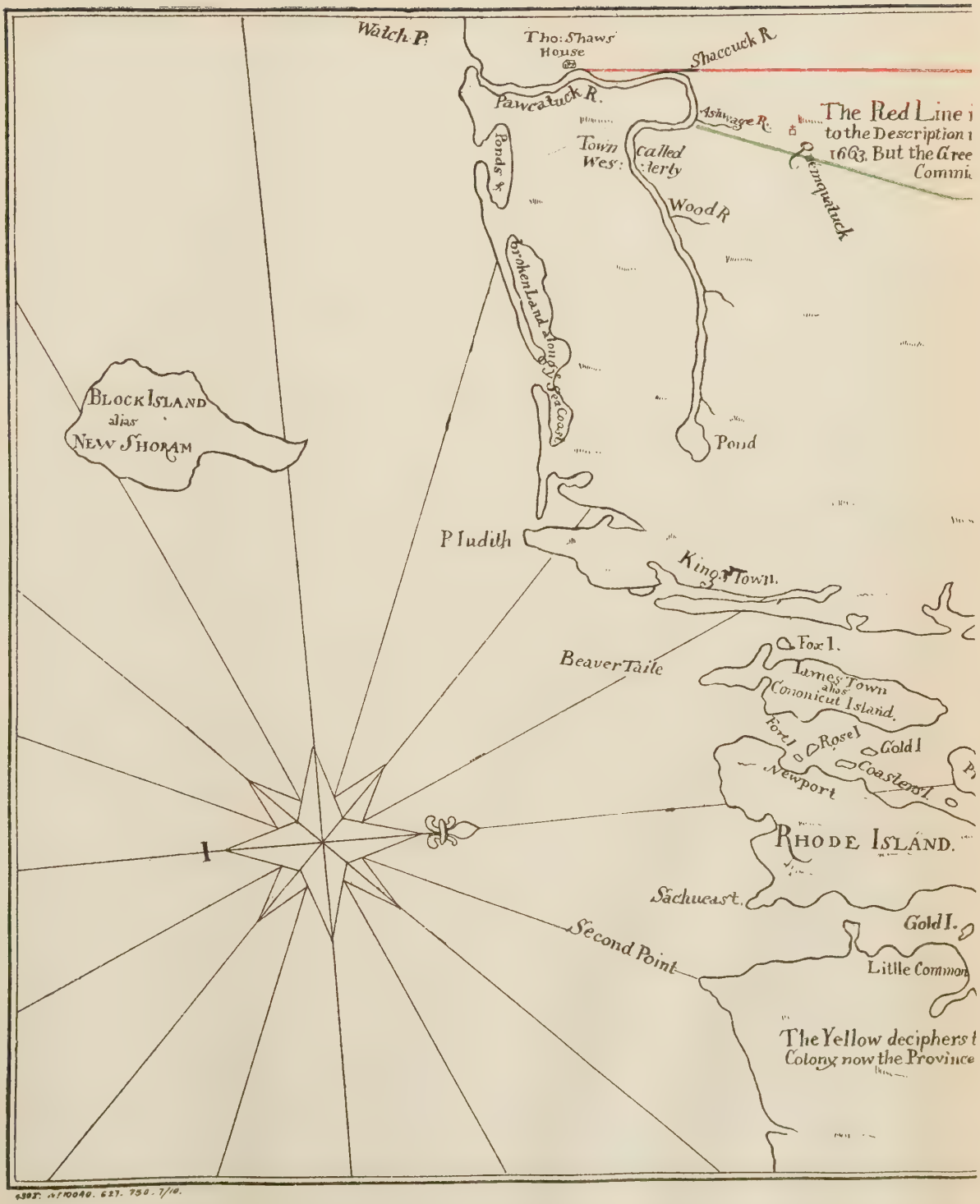
It also is very full in proof that the people of Rhode Island have been in possession of Severall Tracts of Land Extending West from the Narrogansett Bay to the Red and Green Lines marked in the said Mapp hereto annexed as the Boundaries between the said Colonies and that the Taxes had been constantly paid for the same to Rhode Island Government.

It also further appears that the Government of Connecticut have sent two letters on this occasion one to the Lords Commissioners for Trade and Plantations of the 28th day of October 1723, and the other to Mr. Dummer their agent here in which Letter to their agent they Express themselves thus (Vizt.) The Government of Rhode Island is in the actual possession as they themselves own of the Land which they claim and we think belongs to us, We don't think fit to disturb them in that possession, It is not we but they that have made this Complaint if they would have sett still with all they desired their Lordships had not been troubled as they now are with this Story.—And in both their Letters the Government of Connecticut leave the Bounds to be Settled by His Majesty according to Rhode Island Charter.

Their Letter to the Lords Commissioners of Trade running in these words (Vizt.) And Wee Assure Your Lordships That Notwithstanding the Priority of our Charter to that of Rhode Island His Majestys Determination will on our part put a perpetual End to the Controversy and Confirm that peace between us and them which Your Lordships have been pleased to express such a
*16 regard for. And their Letter to their Agent * runs in these words (Vizt.) They doubt not but this Matter (of the Boundaries) will have a good Issue one time or other and even now if their Lordships would let them (the Rhode Island people) understand that they must be contented with these Bounds Sett them in their own Charter and tell them how those Bounds must be understood and taken that would end the controversy they would have no Reason to Complain nor should we give them the least trouble in the Law tho' our Charter be prior to theirs.—

All which being Considered by their Lordships tho' the Red Line in the annexed Mapp is what the Rhode Island people insist on as the true Boundary between them and Connecticut according to their Charter, Yett as the Green Line in the said annexed Mapp was determined in 1703 to be the Division Line between the two Colonys by the Commissioners of each Government respectively appointed for that purpose, Their Lordships are humbly of to advise his Majesty that he would be graciously pleased to Signify his pleasure that the Boundary Line between the said two Colonies as described by the aforesaid Green Line may for ever hereafter be the Settled Boundary between the said two Colonies of Connecticut and Rhode Island and Providence Plantations. . . .

February 8, 1727. [Order in accordance with the report.]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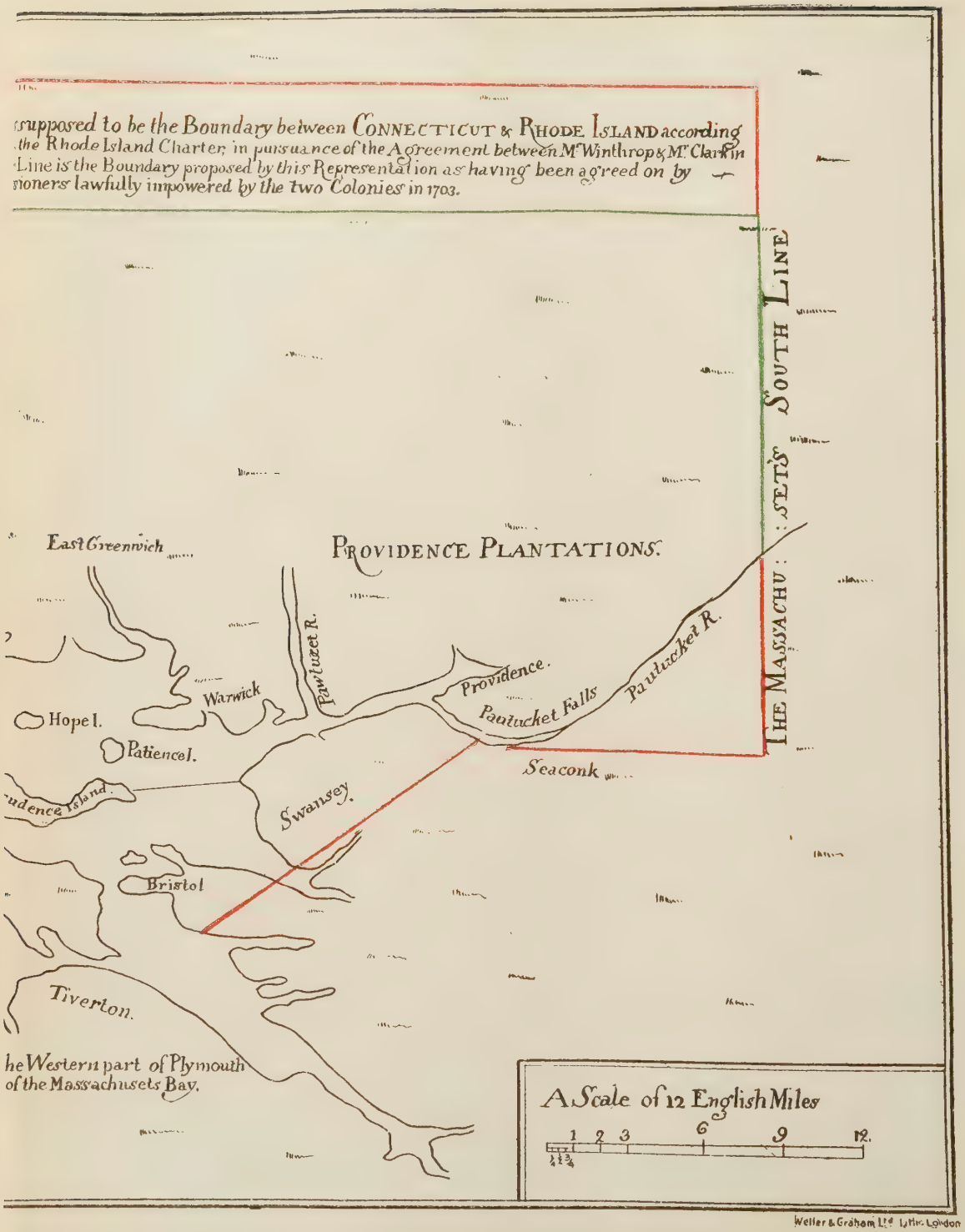
Appendix V.


supposed to be the Boundary between CONNECTICUT & RHODE ISLAND according
the Rhode Island Charter, in pursuance of the Agreement between Mr Winthrop & Mr Clark in
Line is the Boundary proposed by this Representation as having been agreed on by
sioners lawfully impowered by the two Colonies in 1703.
THE MASSACHUSETS SOUTH LINE
East Greenwich
PROVIDENCE PLANTATIONS.
Warwick
Pawtuxet R.
Providence.
Pawtucket Falls
Pawtucket R.
Hope I.
Patience I.
Seaconk
Swansey.
Bristol
Tiverton.
he Western part of Plymouth
of the Massachusets Bay.
A Scale of 12 English Miles
1 2 3 6 9 12.

Weller & Graham Ltd Lithr. London

The Colony of Rhode Island v. The Colony of Massachusetts.

Privy Council, 1746.

[3 *Acts of the Privy Council, Colonial Series,* 436.][1]

A controversy between colonies is a judicial question, and, upon request or petition of one or other, or both, of the colonies, the King in Council will entertain jurisdiction thereof, decide the controversy, and issue *interim* instructions to prevent disturbances in the disputed region *pendente lite.*

A controversy submitted to the King in Council will be considered by the Committee for Hearing Appeals from the Plantations and referred by that body to the Lords Commissioners of Trade and Plantations, before which agents and counsel of the colonies are heard and, in appropriate cases, a commission, composed of residents of the adjoining colonies, will be appointed to hear and to determine the controversy in accordance with instructions prescribing the procedure to be followed, drafted by the Lords Commissioners and approved by the Committee for Hearing Appeals and by the King in Council.

Two persons are to be appointed to represent the colonies in litigation upon whom process may be served, and upon the failure of one or the other of the colonies to present its case before the Privy Council or before the Commission, the colony presenting its case may proceed *ex parte* and judgment had by the Commission in the premises.

The costs of the proceedings are to be divided equally between the litigating colonies.

The award of the commission so appointed is transmitted to the Privy Council for its consideration and eventual approval or disapproval. From the final approval of the award by the King in Council there is no appeal.[2]

December 19, 1738. [Reference to the Committee of a representation of the Governor and Company of Rhode Island] setting forth that there has been a long Controversy between them and the Province of the Massachusetts Bay about the Eastern Bounds of the said Colony and therefore humbly praying that His Majesty will be graciously pleased to Determine the same and that in the Interim Instructions may be given to prevent any Violent attempts for the future by either party on the Inhabitants of the lands in Dispute.

January 13, 1735. [Referred by Committee to Board of Trade.]

*437 * May 19, 1738. [Committee order copies of the Board of Trade report to be given to both parties.]

July 20, 1738. [Reference to the Committee of the petition of Francis

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[1] The volume from which this case is taken was issued by the British Government in 1910 and the text is given as there printed.—Editor.

[2] As in the case of *Rhode Island* v. *Connecticut,* the western boundary between the colonies was determined, so in the principal case, the eastern boundary of Rhode Island between that colony and Massachusetts was determined by the Privy Council.

The northern boundary between the State of Rhode Island and the State of Massachusetts was finally established by the Supreme Court of the United States in *Rhode Island* v. *Massachusetts* (4 Howard, 591), decided in 1846, *post,* pp. 836–73, after protracted litigation extending over thirteen years and having formed the subject-matter of eight separate cases.

Rhode Island is bounded on the south by the Atlantic Ocean, on the west by Connecticut, and on the north and east by Massachusetts. It therefore furnishes the interesting example of a State all of whose boundaries with its neighbors have been established by judicial decision.—Editor.

Wilks, agent for Massachusetts Bay,] that he may be heard by his Council against the Issuing any New Commission for ascertaining the Eastern Boundarys between that Province and the Colony of Rhode Island And that the Settlement and Determination thereof made in 1664 by Commissioners appointed by King Charles the Second may stand And that the Petition of the Governor and Company of Rhode Island may be dismissed.

October 26, 1738. [Committee order the report and petition to be heard on 1 Nov.]

November 1, 1738. [Committee report. The Board of Trade report] that they have been attended by the Agents of the respective Colonys and their Counsel and upon hearing what they had to offer on each side, it appeared to them, that this matter has been contested at different times ever since the Year 1664 and that so lately as in the Year 1733 both Provinces being sensible of the Inconveniencys that might arise for want of a final Settlement in this matter, did by their respective Acts of Assembly, each of them appoint three indifferent Persons to decide the matter in Question, with a Power if they could not agree to name a Seventh as an Umpire between them; That these Commissioners accordingly met, but could neither agree in Settling the Boundarys nor in the Choice of a Seventh Person, wherefore the said Lords Commissioners are of Opinion, that the most effectual Method for putting an end to this Dispute will be by Your Majestys Appointing and Authorizing Commissioners to be Chosen from out of the neighbouring Provinces in America, to meet within a Limited time, and mark out the Dividing Line between the said Province of the Massachusets Bay and Rhode Island Eastward and that in the mean time Your
*438 Majesty may be graciously pleased to * send Orders to the Governors of the respective Provinces, that the People may continue in the Peaceable Possession of their Property without Molestation on either side.

[On considering this report and Wilks' petition, the Committee recommend] that the said Petition of the Agent of the Massachusets Bay ought to be rejected, And that Your Majesty will be pleased to Authorize Commissioners, to be appointed out of the Neighbouring Provinces of America, to Settle the said Boundarys, and that Your Majesty will be pleased to Order the Governor of the said Provinces respectively to take care that the People in the mean time do continue in the Peaceable Possession of their Property without Molestation on either side according to what is proposed in the Report of the said Lords Commissioners for Trade and Plantations.

And the said Petition Appearing to the Lords of the Committee to be frivolous and Vexatious and to have been preferred only with intent to delay and prevent the Settling of the Boundarys of the said Provinces, Their Lordships humbly conceive it may be necessary in Order to prevent such frivolous and Vexatious applications for the future which tend not only to Delay and interrupt the Course of Proceedings but also to bring unnecessary Expences upon those who are obliged to Defend themselves against such Applications That Your Majesty may be pleased to Order that the Lords of the Committee of Your Majestys most Honourable Privy Council for Plantation Affairs do not proceed upon any Applications by Petition or otherwise, praying to be heard against any Determinations of the Lords Commissioners for Trade and Plantations upon any matters which have or shall be referred to them by Your Majesty in Council or

by the Lords of the Committee for Plantation Affairs, upon which it shall Appear that the said Lords Commissioners have heard the Persons concerned, either by themselves their Counsel or Agents unless such Petitioner or Petitioners or some Person in his or their behalf Do first Enter into some Sufficient Security to pay such Costs as shall be awarded by Your Majesty in Council
*439 thereupon * And their Lordships do further humbly propose that Your Majesty may be pleased to Order the same Rule to be Observed in all cases, which shall Come before the said Committee of Council in consequence of any Commissions that may have been or shall hereafter be issued by Order of Your Majesty in Council for Settling or Adjusting any Boundarys or other Special matters in Dispute in any of Your Majestys Colonys or Plantations in America.

November 30, 1738. [Orders accordingly.]

December 1, 1738. [Committee. The Board of Trade to lay before the Committee the names of persons proper to be Commissioners.]

January 12, 1739. [Committee recommend approval of the nomination by the Board of Trade of] the five Eldest Councillors of the three Neighbouring Provinces Vizt.—Cadwallader Colden, Abraham Vanhorn Philip Livingston, Archabald Kenneday and James De Lancey Esqrs. for the Province of New York.—

John Hamilton, John Wells John Reading Cornelius Vanhorn and William Provost Esqrs. for the Province of New Jersey.—

William Skene William Shirreff Henry Cope, Erasmus James Phillips and Otho Hamilton Esqrs. for the Province of Nova Scotia which last mentioned Gentlemen the said Lords Commissioners have Substituted in the Place of Major Paul Mascarine who was formerly left out by Your Majesty on a like Occasion because he had an Estate in the Province of the Massachusets Bay.

January 17, 1739. [Order accordingly.]

May 6, 1740. [Committee order, referring it to the Board of Trade to hear parties on a petition of the Governor and Company of Rhode Island as to the issuing a commission for settling the boundaries agreeable to the heads thereto annexed, praying that the Massachusetts agent be required to attend to
*440 declare his objections, if any, and that the whole charges of the * commission be borne in equal moieties by the said colony and province. The Board of Trade are thereupon to submit a draft of such heads and clauses as they shall think proper to be contained in the commission.]

June 26, 1740. [Committee order for delivering to the parties copies of the Board of Trade report and draft of heads for the commission.]

July 1, 1740. [Committee report submitting the draft articles for approval, and proposing that circular letters be sent giving notice of the commission to the Governors of the provinces whose senior councillors are to act as Commissioners, intimating the time and place of meeting of the Commissioners and directing them to recommend it strongly to such of the Commissioners as are able to go and attend this duty. It is also proposed that letters be sent to the Governors of Massachusetts Bay and Rhode Island to recommend to their Councils and Assemblies] to appoint two of their Publick Officers residing in the said Province and Colony on either of whom or at whose Place of Abode any Notices Summons or final Judgment of the said Commissioners may be served

or left And to send the Names and Places of Abode of such Officers to the said Commissioners at their first Meeting together with a Plan and full State of their Demands or pretensions in Writing describing where and in what Places the Boundarys between the said Province and Colony ought to begin and what Courses and how far the same ought to run respectively. And to acquaint them that in case of their Omission so to do the said Commissioners are impowered to proceed Ex partê.

Draught of Heads and Clauses proper to be contained in a Commission for the Settling and Adjusting the Boundarys between the Province of the Massachusets and the Colony of Rhode Island.

1. Whereas a Dispute hath been long subsisting between His Majestys Province of the Massachusets Bay and His Colony of Rhode Island in America relating to the Eastern Boundarys of the said Colony towards the said Province.

*441 * 2. His Majesty therefore doth Nominate Authorize and appoint [as Commissioners the Councillors proposed by the Committee on 12 Jan., 1739, or any five or more of them].

3. His Majestys Will and Pleasure therefore is that the said Commissioners do repair by the first convenient Opportunity to the Town of Providence within the said Colony being most conveniently Scituated for that Purpose and there hold there [their] first Meeting on the First Tuesday in March which shall be in the Year of Our Lord 1740–41 from which Day and any future Days of Adjournment they may Adjourn to such time and times as may be most convenient for them.

4. That in case five of the Commissioners shall not be present on the said first Tuesday in March 1740–41 or on any other Day of Adjournment then such or a Majority of such of them as shall be present shall and may Adjourn the further Execution of this Commission in manner aforesaid.

5. That at their first meeting they do make choice of One or more Clerk or Clerks to enter their Minutes and Proceedings and at the first Meeting where five or more shall be present that they do make choice of one or more Skillful Persons to prepare Draughts or Plans of the County or Boundarys as there shall be from time to time Occasion.

6. That they do Administer to such Clerks or other Persons as they shall Employ an Oath (or if they shall be of the People called Quakers an Affirmation) for the due and faithfull Execution of their Trusts.

7. That of the Commissioners present at any Meeting he who is first Named in the List of Commissioners shall Preside at such Meeting and shall issue out the necessary Summons for such Witnesses as either Party shall require.

8. That the said Commissioners do use all convenient Dispatch in this Affair.

9. That all Determinations be made by a Majority of the Commissioners who shall be present at the respective Meetings Provided there shall be then Present five or more of the said Commissioners.

*442 * 10. That in case either the said Province of the Massachusets Bay or the said Colony of Rhode Island shall neglect to send to the Commissioners at the first Day of Meeting of the Commissioners the Names and Places of Abode of two of their Publick Officers residing in the respective Province

and Colony on either of whom or at whose Place of Abode any Notice Summons or final Judgment of the said Commissioners may be served or left And in Case either the said Province or the said Colony shall neglect to send to the said Commissioners at the first day of Meeting of the Commissioners a plain End and full State in Writing of the Demands or Pretensions of the said Province and Colony respectively where and in what Places the Boundarys of the said Colony Eastwards ought to begin and what Courses and with what Variation and in what manner and how far the same ought to run (to the End that Copys thereof may be mutually Exchanged in Order to prevent any unnecessary Delay and that each Party may come fully prepared) then in either of those cases the said Commissioners or any five or more of them to Proceed Ex partê.

11. That no Witness or Witnesses be allowed of by the Commissioners to give Evidence but such as shall be Sworn (or being of the People called Quakers shall take a Solemn Affirmation) before the Commissioners in open Court (which Oath or Affirmation the Commissioners or any five or more of them are hereby impowered to Administer).

12. That all Interrogatorys and Questions which shall be put to such Witnesses before the Commissioners shall be set down in Writing and that the whole of what such Witnesses shall Offer to the Commissioners shall also be set down in Writing by the said Clerk or Clerks in the Presence of the Commissioners and of the respective Witnesses and that the same be read over to and Signed by the respective Witnesses.

13. That the Commissioners shall appoint such time as they shall find reasonable within which all the Witnesses on each side shall be produced to be Examined.

*443 * 14. That Entrys be made of all Charters, Grants, Deeds, Evidences, Proofs and Plans received by the Commissioners in this affair and also of all the Commissioners Proceedings and Resolutions throughout the same and that such Plans Maps or Draughts of the Boundary Lines as shall be agreed upon by the Commissioners be annexed to and made part of the Commissioners Determination.

15. That when the Commissioners shall have made their final Determination and Signed the same a Copy thereof shall be forthwith sent to such Publick Officer or Officers as beforementioned in the said Province and Colony respectively, together with Notice of another Meeting to be held by the Commissioners at the Distance of two Months or at such further reasonable time not exceeding three Calendar Months as the Commissioners shall appoint.

16. That at such future Meeting the said Province and the said Colony respectively or either of them who shall find themselves aggrieved may enter their Appeal to his Majesty in His Privy Council with a Declaration what Parts of the Determination of the Commissioners they respectively Abide by or Appeale from.

17. That if the said Province or the said Colony shall not enter their respective Appeale or Exception against such Determination at such last Meeting then no Appeale or Exception shall be afterwards received or admitted from such of the Partys who shall Omit to enter their respective Appeals or Exceptions at such last Meeting of the Commissioners And in case neither the said Province nor the said Colony shall then enter any Appeale or Exceptions the Determina-

tion of the Commissioners (being confirmed by His Majesty in Council) shall be final and conclusive to both the said Province and Colony.

18. That the said Province and the said Colony be permitted to take out at their own respective Expence Copys of the whole Proceedings, Proofs, Exhibits, Plans and all other Papers and Writings in this Affair to be Attested by three or more of the Commissioners.

*444 * 19. That the Commissioners do return a fair Copy of the whole Record attested by three or more of them to His Majesty in Council.

20. That the Charge of this Commission and of the carrying it into Execution and of the Commissioners their Clerks, Surveyors, and Officers be born and paid in equal Moietys by the said Province and the said Colony.

July 10, 1740. [Orders accordingly. The Attorney and Solicitor General to prepare a draft commission agreeable to the proposed heads inserting any other articles tending to the better carrying into execution of the intentions of the Lords Justices in Council. The Board of Trade to write the letters to the Governors.]

August 14, 1740. [The commission, which was referred to the Committee on 31 July, and approved of by them on 13 Aug., is approved. P. R.]

July 29, 1742. [To the Committee for Appeals is referred the appeal of the Governor and Company of Rhode Island] from several Particular Parts of the Determination of the Commissioners.

September 15, 1742. [The appeal of Massachusetts Bay against every part of the said determination is similarly referred.]

December 11, 1744. [The Committee, after meeting on 6 Nov., 13 Nov., and 26 Nov., recommend dismissal of both appeals, and confirmation of the determination of the Commissioners, which was pronounced on 30 June, 1741, in the following words]:—The Court took into Consideration the Charters Deeds and other Evidences, Claims, Pleas, and Allegations produced and made by each Party referring to the Controversy before them, and after mature Advisement, came to the following Resolutions—That there is not any One Evidence proving, that the Water between the Main Land on the East and Rhode Island on the West, was ever at any time called Narraganset River—That though there

*445 be Evidence, that the Place where the Indian * called King Philip lived near Bristol was Pauconoket, and that another Place near Swansey was called Sowams or Sowamsett, Yet no Evidence has been produced of the Extent of the Pauconoket Country to Seaconk or Pautucket River as it runs to the Line of the late Colony of the Massachusets Bay; For though there be some Evidence, that the Indians at Enmity with King Philip, or with other Indians in Amity with him, lived on the West Side of the said River, and that the Indians Subject to King Philip, or in Amity with him, lived on the East Side of the said River, there is no Evidence that all the Indians Subject to, or in Amity with King Philip lived in the Pauconoket Country—That the Province not having produced the Letters Patent constituting the Council of Plymouth, nor any Copy thereof, the Recital of said Letters Patent in the Deed from the Council of Plymouth to Bradford and his Associates is not sufficient Evidence against the Kings Charter—That the Council of Plymouth being a Corporation, could not create another Corporation, and that no Jurisdiction within the Kings Dominions in America can be held by Prescription, or on the Foot of Prescription—That the Determination of the

Boundarys of the Colonys of Rhode Island and New Plymouth by the Kings Commissioners in the Year 1664 appears to have been only a Temporary Order for preserving the Peace on the Borders of both Colonys without determining the Rights and Titles of either Upon the whole nothing appears whereby the Colony of Rhode Island and Providence Plantations can be barred or hindered from extending their Jurisdiction Eastward towards the Province of the Massachusets Bay according to the true Intent and Meaning of their Charter—But some Dispute having arisen between the Partys, as to the true Construction and Meaning thereof, The Court is of Opinion, That the Narragansett Bay, is, and extendeth itself from Point Judith on the West to Seaconet Point on the East, and including the Islands therein, layeth and extendeth itself unto the Mouth of the River which runneth towards the Town of Providence, and that
*446 as it so * lies or extends, it has, and may be considered as having, One Eastern Side, as the Eastern Coast of the said Bay runs up Northerly from Seaconet Point, And one other North Eastern Side, from near Mount Hope to Bullocks Neck, as the said Bay runs up North Westerly towards the Town of Providence—And that the Lands adjacent to the said North Eastern and Eastern Coasts, and included within the following Lines, and the said Bay, are within the Jurisdiction of the Colony of Rhode Island Vizt.—On the North East Side of the said Bay—One Line running from the South West Corner of Bullocks Neck North East three Miles—One other Line running from the North East extremity of said Line until it be terminated by a Line three Miles North East from the North Eastermost part of the Bay on the West Side of Rumstick Neck —And one other Line from the Termination of the last Line to the Bay, at or near Towoset Neck, running so that it touch the North East Extremity of a Line running three Miles North East from the North East Corner of Bristol Harbour —And on the Eastern Side of the said Bay—One Line from a certain Point on the Eastern Side of the said Bay opposite to the Southermost Part of Shawomet Neck and Four hundred and Forty Rod to the Southwards of the Mouth of Fall River running East three Miles—One other Line running from the Eastermost Extremity of the said Line till it be terminated by the Eastermost End of a Line, three Miles East from the Eastermost Part of a Cove in the said Bay which is to the Southward of Nanequaket—And one other Line from the Termination of the last Line to the Sea, running on such Course as to be three Miles East from the Eastermost Part of the Bay adjoining to Scitehawest on Rhode Island—And that the said Distances of three Miles East and North East are to be Measured from High Water Mark—And this Court doth hereby Settle, Adjust and Determine, that the Eastern Boundary of the said Colony of Rhode Island and Providence Plantations towards the Massachusets Bay, is, shall be, and runs from a certain Point (where a Miridian Line passing thro' Pautucket
*447 * Fall, cuts the South Boundary of the Colony of Massachusets Bay) South to Pautucket Falls, Then Southerly along the Eastward Side of Seaconte River, and the River which runneth towards the Town of Providence to the South West Corner of Bullocks Neck Then North East three Miles, and then along the aforesaid Lines running at three Miles Distance from the Eastermost Parts of the said Bay, to the said Bay at or near Towoset Neck—Then as the said Bay runs to the Southermost Point of Showomat Neck, And then in a Streight Line to the aforesaid Point opposite the said Neck, then East three

Miles, and then along the aforesaid Lines running at three Miles Distance from the Eastermost Parts of the said Bay to the Sea—All which Lines are to be run by making the proper Allowance for the Variation of the Magnetic Needle from the Miridian—And for the better understanding of the Description of the Lines beforementioned, The Court hath caused the Boundary Lines of the Lands adjacent to the most Eastern and North Eastern Parts of the said Bay, to be delineated on the Map or Plan of the said Bay and Countries Adjacent now in Court, and the same are distinguished on the said Map or Plan, by, A, B, C, D. E. F, G, H.

February 27, 1746. [To a Committee is referred the petition of Christopher Kilby, agent of Massachusetts Bay] praying for the reasons therein contained that His Majesty will be graciously pleased to Order a Plan transmitted to the Lords Commissioners for Trade and Plantations in the Year 1720 by the Government of Rhode Island of the Boundarys of that Colony, and also several Acts of Assembly of the Massachusets Bay for Erecting New Townships, and now laying amongst His Majestys Records, to be laid before His Majesty previous to His Majestys taking the Report of the Lords of the Committee of Council of the 11th of December 1744, relating to the Boundarys, into His Royal Consideration, and that thereupon His Majesty will be pleased to reverse the Judgment of the Commissioners appointed to Settle the Boundarys of the 30th of June 1741
*448 * and to Affirm a Judgment of the Commissioners appointed to Settle the Boundarys in 1664 and to Order the great River called Narraganset to be the Eastern Boundary of Rhode Island agreeable to the Claim of the said Province and the Determination of the said first Commissioners in 1664 or else that His Majesty will be graciously pleased to issue a New Commission to review the Determination of the said last Commissioners that so the said Province may have an opportunity of laying the said Plan and Acts in Evidence before them and which the Petitioner submits as the more reasonable in regard the Determination of the first Commissioners in 1664 is fully in Favour of the said Province, so that at present there are two Determinations of different Commissioners clashing with each other which the Petitioner apprehends is the strongest Reason possible for a Commission of Review, Or that His Majesty will be graciously pleased to make such other Order in the Premises as His Majesty in His Royal Wisdom shall think proper and as the Nature and Circumstances of the Case shall require.

February 27, 1746. [Similarly referred is the petition of Richard Partridge, agent for Rhode Island, praying that the petition of the Massachusetts agent] may be rejected as a Precedent of the most dangerous Consequence, and that the said Report may be laid before His Majesty in Council for His Royal Pleasure. in the same manner as, and according to the constant Course of Proceedings in all other Judicial Appeales whatsoever.

April 21, 1746. [The Committee consider both petitions,] and were attended by Counsel thereupon and think it proper on this occasion humbly to observe to Your Majesty that both the said Provinces were very fully heard in all they had to offer upon their Appeales beforementioned from the Determination of the said Commissioners at four several Meetings of this Committee Vizt. on the 6th 13th and 26th of November and the 11th of December 1744, at which
*449 times full Liberty was * given to either side to lay all proper Evidence before this Committee And the Committee did thereupon Agree in Opinion

that both the said Appeales should be Dismissed and that the Determination of the Commissioners of the 30th of June 1741 should be Affirmed, and a Report was accordingly drawn up on the said 11th day of December to be laid before Your Majesty in Council for Your Royal Approbation; That the present Petition of the Massachusets Bay is calculated with a view to induce Your Majesty to postpone Your Royal Approbation of the Report so made by this Committee for the final Determination of this Affair and by means thereof not only to keep alive the Disputes that have already Subsisted too long between the said Provinces, but at the same time to endeavour to introduce a New Method of proceeding at this Board by admitting of Rehearings or otherwise to have a Commission to Review this matter after it had been so fully heard before this Committee and Our Opinion given thereupon That as they could not produce any Precedents of Appeales being Reheard before this Board (all Attempts formerly made for that purpose having been constantly discountenanced as being attended with dangerous consequences) And as they did not lay any new matter of Evidence before this Committee, Their Lordships Agree humbly to Report to Your Majesty, that they do abide by their former Opinion, That the Judgment or Determination of the Commissioners appointed to Settle the Boundarys of the 30th of June 1741 should be Affirmed and both the Petitions of Appeale therefrom be Dismissed—

May 28, 1746. [The report of 11 Dec., 1744, is confirmed, and the petition of Kilby dismissed.]

Penn v. Lord Baltimore.[1]

Chancery, 1745.

[*Ridgway Cases, tempore Hardwicke, 332; 27 Reprint, English Reports,* 847.]

In a suit between the proprietors of provinces granted by the crown, to settle boundaries, the Attorney General should be a party.

The boundaries of provinces granted by the crown, can not be altered without the consent or privity of the crown.

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[1] The bill in *Penn* v. *Lord Baltimore* was filed June 21, 1735, because the Court of Chancery, not the Privy Council, was the appropriate branch of the Government in which to secure the specific enforcement of an agreement, as appears from the following extract from the minutes of the Privy Council under date of May 10, 1735:

"It appearing that on the 10th of May, 1732, Articles of Agreement had been entered into between the Lord Baltimore and the said John Thomas and Richard Penn for adjusting the Boundarys of the Lands granted to them by their respective Charters Which Articles had not been carried into Execution within the time thereby limited, But notwithstanding such Lapse of time, the Validity of the said Articles being insisted on by and on the behalf of the said John Thomas and Richard Penn—The Lords of the Committee do agree humbly to Report to Your Majesty as their Opinion that the Consideration of the said Report and Petitions should be adjourned until the end of Michaelmass Term next in Order to give an Opportunity to the said John Thomas and Richard Penn to proceed in a Court of Equity to obtain relief upon the said Articles of Agreement so insisted upon by them according as they shall be advised. And that after the Expiration of the said time either party should be at Liberty to apply to the Committee of Councill for Plantation Affairs, as the Nature of the case may require." (*Acts of the Privy Council, Colonial Series,* Vol. III, p. 336.)—Editor.

The plaintiffs in this case were, *John Pen, Thomas Pen,* and *Richard Pen,* proprietors of the province of *Pensylvania* in *America,* and the territories thereof. The bill was brought to have a specifick performance of articles of agreement, dated 10 *May* 1732, to ascertain the boundaries between the provinces of *Pensylvania* and *Maryland,* and what are called the three lower Counties[1] lying between the said provinces, and likewise for a satisfaction for the costs and expences which the plaintiffs have been at on account of the non-performance through the means and contrivance of the defendant and his agents.

William Pen, grandfather to the plaintiff had by will devised to
*333 some other *Pens* 40,000 acres, to * take the same in any of the parts of *Pennsylvania* that were not cultivated: Several and continual controversies had subsisted from the time of the original grant to the *Pens* in 1682 between the present parties and their ancestors concerning those three counties, and boundaries of their several provinces, and bloodshed had frequently ensued upon them. In the year 1732, plaintiffs and the defendant came to an agreement, and articles were drawn up and executed between them, purporting that a line should be drawn between the said provinces, and each party was to execute reciprocal releases. On these articles was indorsed a covenant on the part of the devices of the unlocated lands under the will of *William Pen,* the grandfather, that they would not obstruct the performance of these articles or the right the defendant might derive to any lands under the said articles by any claim they might make or *lien* they might have thereon.

Sometime after the defendant having room to doubt the title of the plaintiffs to these three lower counties, and that the right remained still in the crown, applied for a grant of those three counties from the crown, and the plaintiffs opposing it, all proceedings were stopped until the right upon these articles was settled in this court.

These articles were in order to settle which were the northern boundaries of Maryland, and southern boundaries of Pensylvania.

It was objected by the defendant, First, that there was a want of title
*334 in the plaintiffs, and therefore * that these articles could not be carried into execution: Secondly, That this is a case out of the jurisdiction of this court: Thirdly, that proper parties were not before the court; and that the attorney general on the part of the crown ought to have been made a party, as likewise the devisees under the will of *William Pen,* the grandfather, who had indorsed, and were thereby parties to these articles.

Per Curiam [Lord Hardwicke]. The objection of the right to these premisses being in the crown is the weakest of the objections; and the single point in this case, is, whether as the matter stands, this court can decree a performance of these articles? If these lands were in *England,* without any articles of agreement, the bounds might be settled. This is a question between feudatory Lords, proprietors of provinces: And concerning not only their private interest, but the rights of government and the right of private persons, and has been well compared to the case of the Lords marches. If a private question arose between tenants there, it was determined in the court of the marches, on which a writ of error lay in the King's Bench, being dependant on the crown of *England;* and on

[1] The Three Lower Counties lying on the Delaware River were separated from Pennsylvania on the outbreak of the American Revolution to form Delaware State, now called the State of Delaware.—Editor.

that account, all disputes between lords marches were determined originally in the King's Bench, as the place where the writs of error in private affairs lay. So here the disputes of private persons in the provinces are determined in the courts of the province, on which a writ of error by way of appeal lies before the
*335 king in council. Therefore questions between proprietory * lords, in analogy to the ancient law of the marches must be determined before the King in council, and always is so, notwithstanding the statute of the 16 *Car.* 1. which restrains the power and jurisdiction of the privy council; but a court of equity-jurisdiction is *in personam,* and therefore can extend it wherever the parties persons are within its jurisdiction: But here are in this case articles of agreement between the parties, and the sole question is, Whether a complete final decree can be made in this case, without these parties before the court.

Objections in this court for want of parties are favourable objections, and therefore made; and on the other hand, this case in order to be heard must have been attended with great expence. The objections are of two kinds, public and private; the first is, That the Attorney General should have been a party: Secondly, That the grand children and devisees of *William Pen* of the 40,000 acres should have been so too. As to the first, it is in force, by two reasons, one, that the right to the three counties remains still in the crown: If it had rested upon that, if Lord *Baltimore* had no right, and an absolute one in the crown, I should have thought it no objection in that case against the court's decreeing; because the agreement was nugatory, nor no objection for want of parties: The other reason is, that supposing an equitable right in the plaintiffs, the legal right is in the crown: And to shew that, the defendant insists on the feoffment made, and that the duke of *York* had not the legal estate, till six months after his
*336 grant to * *Pen.* If that should be the case, that will certainly require the Attorney General to be made a party: For whatever lands he had before he was king, he is afterwards seised of in right of his crown. The king may be a royal trustee, and if that should turn out to be the case, the plaintiffs will have the benefit of it: But the Attorney General, in order to it, must be before the court. It is true, you cannot always have a decree against the Attorney General, yet he must always be a party: For though the Court of Exchequer cannot decree against the King to convey, yet they will stay the process of the crown to impound the profits: And those not being lands within the survey of the Court of Exchequer, this court can take notice of it equally. And if it should appear that those three counties were comprised and passed legally in *Pen's* first grant, it will prevent the Attorney's being a party on that account. But the most material ground for making him a party is, that this agreement which is said to concern the proprietors of the said provinces only, will and must in the course and nature of it determine and affect the private properties of the subjects of those several provinces: For here are powers of government, jurisdiction, legislature, raising subsidies, together with all kinds of military powers granted by these deeds: If, in such case, proprietory Lords are to alter the bounds of their provinces, without the privity and consent of the crown, by whom alone such powers are vested, directed, and disposed, consider the inconveniences that must follow; this is no less than transferring lands into different jurisdictions,
*337 legislations, &c. * you subject the people to different government, different assemblies, laws, courts, taxes, to which they never assented by their

delegates; a quite different case from where they alienate, and the statute of the 7 & 8 *W.* 3. c. 22. sect. 16. implies as much: But this is not the case, for admitting they may, the person is only there changed, not the jurisdictions, legislations, &c. If this be so, can such a case be determined here without the representative of the crown before this court? And though supposing he was, that they could not decree the crown to license and consent that the parties might transfer as above; yet he should be a party to state the right of the crown, and shew his objections; and a stronger case to require him cannot be.

It has been said this order of council has reserved such rights after the determination here; but that is a mistake in respect to the order; for it does not say or mean after the determination of the cause, but of Michaelmas Term next, meaning this term: There is no reservation therefore of the rights of the crown. If I was to give an opinion only, I could certainly, notwithstanding this; but I am to give a judgment, a decree; I must decree that these articles be performed, decree the naming commissioners, and making conveyances: Can I do this, without knowing whether the crown consents by the Attorney General? I am of opinion therefore, that Mr. Attorney General must be made a party.

As to the other, *scil.* the devisees of the 40,000 acres, I am likewise
*338 of opinion, that they ought to * have been parties: If they had been no parties to the articles, they need not to have been so here; but by their indorsement of the same date with the articles, they are actually made parties: they under hand and seal testify their assent to the articles; if they had been named in the body of the deed, they must have been named parties; for the court must decree an entire performance, and indorsement is part of the deed. Let the plaintiff be at liberty therefore to amend his bill, as he shall be advised, on payment of the common costs of the day.[1]

Vide the case of the *Isle of* Man,[2] before the council.

Penn v. Lord Baltimore.

Chancery, 1750.

[1 *Vesey Senior,* 444; 27 *Reprint, English Reports,* 1132.]

Specific performance decreed of articles executed in England concerning boundaries of two provinces in America.

Jurisdiction of the court though submitted to by answering, yet if a want of it appears at hearing, no decree.

Original jurisdiction as to bounds of proprietary governments in King in Council. But by the contract of parties brought within this jurisdiction.

King in Council can not decree an agreement; not acting in *in personam,* as this court can.

Proprietors of these governments may settle bounds between themselves, as in the *Marches* and counties *Palatine.*

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[1] *Vid.* 1 Ves. 444 Decree upon the further hearing.

[2] For these interesting cases, see *Derby* v. *Athol* (1 Ves. Sen. 202), decided in 1749; *Bishop of Sodor & Man* v. *Earl of Derby* (2 Ves. Sen. 337), decided in 1751.—Editor.

Tenure of the planters preserved by the agreement; they need not be parties.
Agreement not decreed without consideration. Settling bounds a mutual consideration.
Possession sufficient in a suit to settle bounds.
Agreement decreed, though it could not be enforced *in rem.* The primary decree in equity *in personam.*

The bill was founded on articles, entered into between the plaintiffs and defendant 10 *May* 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent granted 20 *June,* 2 *C.* 1, by which the district, property, and government, of *Maryland* under certain restrictions is granted to defendant's ancestor his heirs and assigns: farther reciting charters or letters patent in 1681, by which the province of *Pensylvania* is granted to Mr. *William Penn* and his heirs; and stating a title to the plaintiffs derived from *James* Duke of *York,* to the three lower counties by two feoffments both bearing date 24 *August* 1682. The articles recite, that several controversies had been between the parties concerning the boundaries and limits of these two provinces and three lower counties, and make a particular provision for settling them by drawing part of a circle about the town of *Newcastle,* and a line to ascertain the boundaries between *Maryland* and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 *December* 1733. There was beside a provision in the articles, that if there should be a want of a Quorum of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of £5000 to the other party: and a provision for making conveyances of the several parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles: what else was in the cause came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the
*445 *Attorney General* should be made a party; who now left it * to the court to make a decree, so as not to prejudice the right of the crown.

The first objection for defendant was, that this court has not jurisdiction nor ought to take recognizance of it; for that the jurisdiction is in the King and council.

Second objection, that if there is not an absolute defect of jurisdiction in this court, yet being a proprietary government and feudary seigniory held of the crown, who has the sovereign dominion, the parties have no power to vary or settle the boundaries by their own act; for such agreement to settle boundaries and to convey in consequence, amounts to an alienation, which these lords proprietors cannot do: but supposing they may alien entirely, they cannot alien a parcel, as that is dismembering; for which there is a rule in the feudal books concerning *Feuda indivisibilia.*

Thirdly, this agreement ought not to be carried into execution by this court; as it affects the estates, rights and privileges of the planters, tenants and inhabitants within the district, and the tenure and law by which they live, without their consent.

Fourthly, supposing all this answered, yet this agreement is not proper to

be established from the general nature and circumstances. First, as it is merely voluntary, and the court never decrees specifically without a consideration. Secondly, as the time for performance is lapsed. Thirdly, that these articles are in nature of submission to arbitration, which cannot be supplied by interposition and act of this court. Fourthly, that defendant was imposed on or surprized in making this agreement. Fifthly, that if there was no imposition or fraud, defendant grossly mistook his original right; and under that mistake and ignorance, the articles were founded and framed. Sixthly, the agreement in some material parts is so uncertain, that it cannot be decreed with certainty according to the intent of the parties, for that no centre is fixed; without which it is impossible to make a circle: nor is it sufficiently described, whether it should be a circle with a radius of twelve miles or only a periphery of twelve miles. Seventhly, there is a covenant for mutual conveyances; whereas the plaintiffs have no estates in the lower counties, so as to make an effectual conveyance to defendant; and an agreement must be decreed entirely or not at all; on the plaintiff's own shewing the legal estate and property is in the crown: so that at most they have but an equitable right, in which the crown is trustee; and then this court
*446 cannot decree a conveyance. * In *Reeve* v. *Attorney-General,* 1741, lands were devised to a wife, and after her death to be sold, and the money to be divided among the plaintiffs: the testator dies without heirs; so that the legal interest in the estate descended to the crown, but with a trust to be sold. On a bill to have the will established, and to hold against the crown, or the lands sold, *His Lordship* dismissed the bill; and said, where the crown was trustee, the court has no jurisdiction to decree a conveyance; but they must go to a petition of right. (See Mitford, 29.) Eighthly, this court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

Lord Chancellor [Hardwicke]. I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a *Roman* senate rather than of a single judge: and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a *Roman* senate that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence; which will fall in more naturally, and very intelligibly, under the particular points arising in the cause.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this court; the specific performance of agreements being one of the great heads of this court, and the most useful one, and better than damages at law, so far as relates to the thing in specie; and more useful in a case of this nature than in most others; because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, *viz.* the settling and fixing these boundaries in peace, to prevent the disorder and mischief, which in remote countries, distant from the seat of government, are most likely to happen, and most mischievous. Therefore the remedy prayed by a specific performance is more necessary here than in other cases: provided it is proper in other respects: and the relief sought must prevail, unless sufficient objections are shewn by defendant; who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered: and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put in *primo die;* and answering submits to the jurisdiction: much more when there is a proceeding to hearing on the merits, which would be conclusive at common law: yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain, that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council: and it is rightly compared to the cases of the ancient *Commotes* and *Lordships Marches* in *Wales;*
*447 in which if a dispute is between private parties * it must be tried in the *Commotes* or *Lordships;* but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and council; and the King is to judge, though he might be a party; this question often arising between the crown and one Lord-Proprietor of a province in *America:* so in the case of the *Marches* it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in *B. R.* and *Chancery.* So where before the King and council, the King is to judge, and is no more to be presumed partial in one case than in the other. *This court therefore has no original jurisdiction on the direct question of the original right of the boundaries;* and this bill does not stand in need of that. It is founded on articles executed in *England* under seal for mutual consideration; which gives jurisdiction to the King's courts both of law and equity, whatever be the subject matter. An action of covenant could be brought in *B. R.* or *C. B.* if either side committed a breach: so might there be for the £5000 penalty without going to the council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the court originally were brought within it. Suppose in order by the King and council in a cause, wherein the King and council had original jurisdiction; and the parties enter into an agreement under hand and seal for performance thereof: A bill must be in this court for a specific performance; and perhaps it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. *The King in council is the proper judge of the original right;* and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right: *but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree in personam in England unless in certain criminal matters; being restrained therefrom by stat. 16 Car. and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract.* The conscience of the party was bound by this agreement; and being within the jurisdiction of this court (4 Inst. 213; 1 Ves. sen. 204, 552), which acts *in personam,* the court may properly decree it as an agreement, if a foundation for it. *To go a step farther: as this court collaterally and in consequence of the agreement judges concerning matters not originally*
*448 *in its jurisdiction, it would * decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant.*

As to the second objection: if it was so, it would be very unfortunate; for suits and controversies might be for that reason endless; and this has subsisted above seventy years. This objection is insisted on at the bar, and not by the answer. The subordinate proprietors may agree how they will hold their rights between themselves: and if a proper suit is before the King in council on the original right of these boundaries, the proprietors might proceed therein without making any other parties except themselves. In this respect also it is properly compared to the case of *Lordships Marches* and to counties *Palatine.* When the *Marches* subsisted, there might be a suit in *B. R.* concerning their boundaries; and the Lord of each *March* in question need be the only party. If a matter of equity arose, either of the *Lordships Marches* might have sued in equity to settle, because this is the King's court of general jurisdiction as to matters of equity; and an agreement between the parties relative to these boundaries, if proper in other respects to carry it into a specific performance, is a matter of equity. The court might indeed by reason of their tenure require the *Attorney-General* to be made a party, to know, if he had anything to object; but then might hold plea of the cause. Suppose, both counties *Palatine* were in subjects hands (as both have been formerly), and subsisted so; and a question had arisen concerning the boundaries of these two counties *Palatine;* and the respective Earls *Palatine* had entered into articles concerning these boundaries: this court would have held plea of such articles as well as concerning the boundaries of manors, seigniories, and honours; for these are honours, only a franchise of a higher nature. *To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits.* But suppose it savours in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I; *but it is a new notion, that the Lords proprietors of these provinces may not alien to natural-born subjects.* This is no opinion: but the grants themselves are framed so as to be most open to alienation; being grants to them and their heirs to be held in common *socage;* not in *capite* of the crown, but as *Windsor Castle* is. What rule of law is there, that lands or a franchise granted to be held in common *socage,* not in *capite,* but as of a particular honour or manor, cannot be aliened without licence?

All the objections concerning *knight's service* or *capite* lands are out of the
*449 case, and the act 7 and 8 *Will.* 3, cap. 22, sect. 16, supposes, * the proprietors may alien to a natural-born subject. The first words of the clause there are, that they and their assigns may be restrained from alienating without licence, which supposes that it was assigned; and this appears in the case of *Carolina.* As to the not alienating a parcel, the rule cited out of the *Feudists* is not applicable; those books treating of different tenures; but I admit, neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted, and thereby bind the crown, of whom they held; for the tenure and services would still remain on the whole, and the crown might demand the whole services from either. It is therefore something like the case of the office of high constable of England, held by tenure of *grand serjeanty;* which was very extraordinary, to hold the manors by tenure of such an office [1 Inst. 106, 149, 165]. In Kel. 170, and Dy. 215, the judges reported their opinion to K. H. 8, that the tenure was not extinct by the division, but that the King had a

right to insist on the performance of that office from the Duke of *Buckingham* by reason of his moiety: but this exacting the performance of the service from either subject is at the King's pleasure to do or not. This is an instance that in honours and tenures of this kind, the King cannot be prejudiced by any alienation, division or severance between the parties; and if material services are reserved on the grant (though here it is by fealty only in lieu of all) the entire services might be exacted from either, not being apportionable. *But the settling limits is not a dismembering; and if a licence to do this was necessary from the crown in law and policy, it sufficiently appears, there was such;* for it appears by orders of council made in 1685 and 1709, the crown has not only recommended, but ordered, this division to be made so far as respects the three lower counties; as to which there is no dismembering; for the dividing line is thereby exactly the same: indeed the circle is not within these orders: but as to that no difficulty can arise.

As to the third objection: the tenure of the planters, *&c.,* remain just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preserve them. The King of *England* is still their sovereign and supreme Lord; both charters require, the law of the respective provinces should be conformable to the law of *England,* as near as could be. Consider, to what this objection goes; in lower instances, in the case of manors and honours in *England,* which have different customs and by-laws frequently: yet though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties; or may be settled by agreement, which this court will decree without making the tenants parties: though in case of fraud, collusion or prejudice to the tenants, they will not be bound; but notwithstanding it is binding on the parties, and to be established as to them. Suppose, two
*450 bordering manors had been granted out in tail in recompence * of services, the reversion in fee to the crown: in a suit between the lords concerning the boundaries, it is not necessary to make the King or tenants parties to this suit. Indeed the crown would not be bound by that agreement or decree: but it is still binding between the parties. But in this case the same final answer occurs, that does under the other objection; *viz.* that if there is no fraud or collusion, it must be presumed to be the true limits being made between parties in an adversary interest; each concerned to preserve his own limits, and no pecuniary or other compensation pretended. And (abstracted from the general question of want of jurisdiction) suppose, either party insisted, there was such a breach of the *proviso* here, as incurred the penalty, and brought *Debt* in *B. R.* for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done): the court must have relieved against the penalty on performance of the articles; judging on the terms of the relief, and dispensing with the point of time, the court could not have avoided it. Then how does this case differ? For it will not be pretended, the King in council would have had plea in that case: it must have come into the King's courts of equity, which must have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumstances of the agreement.

First it is true, the court never decrees specifically without a consideration:

but this is not without consideration; for though nothing valuable is given on the face of the articles as a consideration, the settling boundaries, and peace and quiet is a mutual consideration on each side (*Note:* So settling disputes, though it afterwards appear that one of the parties had no title, where no fraud. *Stapilton* v. *Stapilton,* 1 Atk. 2. *Frank* v. *Frank,* 1 Ch. Ca. 85. *Cann* v. *Cann,* 1 P. W. 723, 727. *Pullen* v. *Ready,* 2 Atk. 592. *Goilman* v. *Battison,* 1 Vern. 48. *Cory* v. *Cory,* 1 Ves. sen. 19. See 2 Vol. 284); and in all cases make a consideration to support a suit in this court for performance of the agreement for settling the boundaries.

The objection of the time for performance being lapsed may be answered; for it is the business of this court to relieve against lapse of time in performance of an agreement; and especially where the non-performance has not arisen by default of the party seeking to have a specific performance; as it plainly does not here. (*Note:* Though courts of equity will relieve against lapse of time in various cases, as in *Vernon* v. *Stephens,* 2 P. W. 66. *Pincke* v. *Curtis,* 4 Bro. 329. *Fordyce* v. *Ford,* ibid. 494. *Lloyd* v. *Collett,* ibid. 469; and 4 Ves. jun. 689, 690; and *Gregson* v. *Riddle,* cited 7 Ves. 268; yet they by no means consider lapse of time as wholly immaterial, *Gibson* v. *Paterson,* 1 Atk. 12, is therefore misreported, vide 4 Bro. 497, and ibid, 471, note; 4 Ves. 690, note. See *Seton* v. *Slade,* 7 Ves. 265.)

Next, these articles are not like submission to arbitration. In those cases generally the time is conditional, so as determination be made by such a day; here the line and circle are agreed on by distinct, independent, covenants, and that they shall form the boundaries of these tracts of land: *this therefore is a particular, certain, specific contract of the parties, that these shall be the boundaries; nothing left to the judgment of the commissioners, who are merely ministerial to run the line, &c., according to the agreement, and set the marks. Therefore it is not like an award, but is an agreement, which this court will see pursued.*

*451 * As to the imposition or surprise, the evidence is clearly contrary thereto. It would be unnecessary to enter into the particulars of that evidence: but it appears *the agreement was originally proposed by defendant himself:* he himself produced the map or plan afterward annexed to the articles (vide 1 Ves. sen. 19; 2 Ves. sen. 46, 284): he himself reduced the heads of it into writing, and was very well assisted in making it: and farther that there was a great length of time taken for consideration and reducing it to form. But there is something greatly supporting this evidence, *viz.* the defect of evidence on the part of the defendant, which amounts to stronger negative evidence, than if it was by witnesses; for it was in his own power to have shewn it if otherwise. Then am I to presume, he was imposed on, in a plan too sent to himself by his own agents: as to the plan itself, it was in his own power; with regard to the original of these minutes of the agreement wrote by himself, though ordered by the court to be produced, they are not produced; which negative evidence supports the evidence of the fairness of carrying on this agreement on the part of the plaintiffs.

I admit, that, though no imposition or fraud, yet a plain mistake contrary to the intent would be a ground not to decree specific performance. But consider the evidence thereof: the defendant and his ancestors were conversant in

this dispute about fifty years before this agreement was entered into, and had all opportunities; therefore no ignorance, want of information or mistake, are to be presumed: and in cases of this kind after an agreement, and plain mistake contrary to intent of parties not shewn, it is not necessary for the court to resort to the original right of the parties: it is sufficient, if doubtful. To consider the points in dispute, and first upon the defendant's charter; in which *it is insisted, the whole 40th degree of North latitude is included;* and if so, that it is not to be limited by any recital in the preamble. There is great foundation to say, the computations of latitude at the time of the grant vary much from what they are at present; and that they were set much lower anciently than what they are now; as appears by Mr. *Smith's* book, which is of reputation: but I do not rely on that; for the fact is certainly so. But whatever that was, does it take it in by the description? It comes to the question, whether the *usque ad* is inclusive or exclusive; therefore however described, the same question remains. But there is another argument used by the plaintiffs to restrain the defendant's charter from taking in the whole 40th degree, viz. the recital of it, for the plaintiffs say, *the information, given to the crown by Lord Baltimore, was, that this part was land uncultivated and possessed by barbarians: whereas it was not so, but possessed by Dutch and Swedes; and therefore the King was deceived in his grant.* There is considerable evidence, that *Dutch* and *Swedes* were settled on the
*452 *East* * part of that country; but this is said to be no deceit on the crown; for though some stragglers were settled there, yet if not recognised by the crown, that is not a settlement. *I am of a different opinion; for in these countries it has been always taken, that that European country, which has first set up marks of possession, has gained the right, though not formed into a regular colony; and that is very reasonable on the arguments on which they proceeded.* Then will not that affect the grant? If the fact was so, that would be as great deceit on the crown in notion of law, as any other matter arising from the information of the party; because such grants tend to involve this crown in wars and disputes with other nations: nor can there be a greater deceit than a misrepresentation tending to such a consequence; which would be a ground to repeal the letters patent by *scire facias. Next consider the dispute on Penn's charter, which grants to him all that track of land in America from twelve miles distance from Newcastle, to the 43d degree of North latitude, &c., under which the plaintiff do not pretend a title to the three lower counties, which relate to the two feoffments in 1682.* Upon the charter it is clear by the proof, that the true situation of *Cape Henlopen* is as it is marked in the plan, and not where *Cape Cornelius* is as the defendant insists; which would leave out great part of what was intended to be included in the grant; and there is strong evidence of seisin and possession by *Penn* of that spot of *Cape Henlopen,* and all acts of *ownership.* But the result of all the evidence, taking it in the most favourable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. *Senex,* who was a good geographer, says, that the degrees of latitude cannot be computed with the exactness of two or three miles: and another geographer says, that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles; which is near the whole extent between the two capes. It is therefore doubtful; and the most proper case for an argument, which being entered into, the parties could not resort back

to the original rights between them; for if so, no agreements can stand: whereas an agreement, entered into fairly and without surprise, ought to be encouraged by a court of justice.

The objection of uncertainty (see Lord *Walpole* v. Lord *Orford,* 3 Ves. 402) arises principally on the question concerning the circle of twelve miles to be drawn about *Newcastle,* it was insisted on in the answer, and greatly relied on in America; but is the clearest part of the cause. As to the centre, it is said, that New castle is a long town, and therefore it not being fixed by the articles, it is impossible that the court can decree it; but there is no difficulty in it; the centre of a circle must be a methematical point (otherwise it is indefinite) and no town can be so. I take all these sort of expressions and such agreements to imply a negative; to be a circle at such a distance from *Newcastle,* and in no part
*453 to be farther. Then it must be no farther distant from any * part of *Newcastle.* Thus to fix a centre, the middle of *Newcastle,* as near as can be computed must be found; and a circle described round that town; which is the fairest way; for otherwise, it might be fourteen miles in some parts of it, if it is a long town. Then what must be the extent of the circle? It is given up at the bar, though not in the answer. It cannot be twelve miles distant from *Newcastle* unless it has a semi-diameter of twelve miles: but there is one argument decisive without entering into nice mathematical questions: the line to be the dividing line, and to be drawn *North* from *Henlopen,* was either to be a tangent or intersecting from that circle, and if the *Radius* was to be of two miles only it would neither touch or intersect it, but go wide. There is no difference as to the place or running of the line from *South to North,* though there is as to the cape, from which it is to commence.

As to the seventh head of this objection, it is truly said, that agreements must be decreed entire, or not at all. *As to the plaintiff's estate and possession, this must concern only the three lower counties, which plainly passed by the feoffment.* I will lay aside the question of *Estoppel:* which is a nice consideration; for the Duke of *York,* being then in nature of a common person, was in a condition to be estopped by a proper instrument. *In 1683 the Duke of York takes a new grant from the crown; and having granted before, was bound to make further assurance, for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York therefore while a subject was to be considered as a trustee; why not afterward as a royal trustee?* I will not decree that in this court: nor is it necessary: but it is a notion established in courts of revenue by modern decisions, that the King may be a royal trustee; and if the person, from whom the King takes by descent, was a trustee, there may be grounds in equity to support that; *and if King J. 2, after coming to the crown was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for plaintiffs if they have an equitable estate.* Then consider this in point of possession of the *Penns;* the proof of which is very clear: they have been permitted to appoint governors of these lower counties; which have been approved by the crown, according to the statute of King *William.* Indeed all the acts of possession are with *salvo jure* to the crown; but the evidence for defendants amounts to this: not of a real possession or enjoyment, but of attempts to take possession sometimes by force, sometimes by inciting people to come there; otherwise why should Lord *Baltimore* grant here for half what

he granted in other places? which shews plainly it was an invitation to get settlers there under their title. *Now I am of opinion, that full and actual possession is sufficient title to maintain a suit for settling boundaries: a strict title is never entered into in cases of this kind; neither ought it.* But what ends this
*454 point of want of * title to convey is, that no part of the lower counties is left to be conveyed by plaintiffs to defendant; so that nothing being to pass by plaintiffs it is not material whether they have title to convey or not. But now in cases of this kind, of two great territories held of the crown, I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidence[*s*] of title to lands, or district of lands in *America*, that can be: and so have I thought in all cases since I have served the crown: for the great beneficial advantages, arising to the crown from settling, *&c.*, is, that the navigation and the commerce of this country is thereby improved. Those persons therefore, who make these settlements, ought to be protected in the possession, as far as law and equity can: and both these proprietors appear to have great merit with regard to the crown and the public; for these two provinces have been improved in private families to a great degree to the advantage of their mother country: this regards the three lower countries; the strength of which is vastly on the side of the plaintiffs.

As to the court's not inforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot inforce their own decree *in rem,* in the present case: but that is not an objection against making a decree in the cause; for the strict primary decree in this court as a court of equity is *in personam* (4th Inst. 213; 1 Ves. sen. 204, 447), long before it was settled, whether this court could issue to put into possession in a suit of lands in *England;* which was first begun and settled in the time of *James* I. but ever since done by injunction or writ of *assistant* to the sheriff (*Note:* After service of a writ of execution of a decree for delivery of possession of lands, the court will grant an injunction on a motion of course; and the writ of assistance to the sheriff is founded on it. See in *Huguenin* v. *Bazely,* 15 Ves. 180): but the court cannot to this day as to lands in *Ireland* or the plantations. In Lord *King's* time in the case of *Richardson* v. *Hamilton, Attorney-General* of *Pennsylvania,* which was a suit of land and a house in the town of *Philadelphia,* the court made a decree, though it could not be inforced *in rem.* In the case of Lord *Anglesey* of land lying in *Ireland,* I decreed for distinguishing and settling the parts of the estate, though impossible to inforce that decree *in rem,* but the party being in *England,* I could inforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this court, And indeed in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks by the order of 1735, as if that was in view; liberty being thereby given to resort to that board.

This opens a way to that part of the case relating to the crown. The *Attorney-General* acts a very impartial part; and I shall express in the fullest words, that this decree is entirely without prejudice to any prerogative, right, or interest in the crown. I will go farther; that, as I do not know how far that interest of the crown may be, I will reserve liberty for either party to
*455 apply to * this court, if by any act or right of the crown, execution of this shall be obstructed; for the court is at liberty to suspend its decree, if a

difficulty to perform it is shewn: and I will reserve further directions as between the parties as to that matter so *de novo* arising. Judgments have been at law with a *salvo jure* of the crown; as in *Rastal* and *Coke's* entries in the title of *intrusion* and *quo Warranto;* which particularly in the cases of lands relating to intrusion, is very analagous to the present.

I am of opinion therefore to decree a specific performance of this agreement without prejudice to any right, *&c.,* of the crown.

Next as to the point of costs: for which must be considered, what passed in *America* and *England.* As to what passed antecedent to granting the commission, it is very fair on both sides; all the objection arising from that, is the defence against the performance; and that there are no grounds for the defence from fraud, imposition or mistake, which are made the heads for it. But in *America* the defendant's commissioners behaved with great chicane in the point they insisted on, as the want of a centre of a circle, and the extent of that circle, *viz.* whether a diameter of two or of twelve miles: the endeavouring to take advantage of one of plaintiffs commissioners coming too late, to make the plaintiffs incur the penalty. It is plain, from the articles, both sides should be answerable for default of their commissioners: the penalty shews the intent; though I own, this is not that case; but I do not go on that. The defendant has been misled by his commissioners and agents in *America,* to make their objections his defence; which brings it nearer to himself; and though he would not at all have thought of it as from himself (so that I impute nothing in the lead dishonourable to him), yet I must take it as his own act; and then should not do complete justice, if I did not give plaintiffs the costs of this suit to this time, to be taxed, reserving subsequent costs.

His Lordship, having directed that the plaintiffs and defendant should quietly hold according to the articles, altered that; for it would be improper to have a decree in this court for quiet enjoyment of lands in *America;* which would occasion continual applications to this court for contempts, *&c.,* and that it ought to be the proper jurisdiction.

Mr. *Solicitor-General* in his argument cited the *Massachusetts Bay* company, against the *King,* in 1746, in the council, as to settling boundaries; where on petition by the plaintiffs to rehear, the committee reported, that there was
*456 no instance of rehearing on an * appeal; which would be mischievous, unless on some very particular circumstances, as new discovery or fraud concealed; and therefore the petition was rejected. (Reg. Lib. 1749, B. fol. 439.)[1]

Penn v. Lord Baltimore.

Chancery, 1750.

[*Vesey Sr. Supplement,* 194; 28 *Reprint, English Reports,* 498.]

Specific performance of articles executed in England concerning boundaries of lands abroad.

The directions in the principal case being particular, and as they may be possibly useful, at some time, to the Profession, the author has subjoined them.

The Court [per Lord Hardwicke, Chancellor] declared, "that the articles of

[1] On this point, see *Colony of Rhode Island* v. *Colony of Massachusetts* (*Acts of the Privy Council Colonial Series,* Vol. III, p. 436), *ante,* pp. 577, 584–5.—Editor.

agreement were valid and obligatory upon the parties who executed the same, or the indorsements thereupon, and their heirs and assigns; and that the
*195 * said articles ought to be specifically executed and performed by and between the said parties respectively; notwithstanding that the several periods of time thereby limited for doing and performing divers matters and things therein-mentioned and agreed upon were elapsed; but that the said articles did not bind or prejudice any prerogative, property, title, or interest of the crown, in or to the territories, districts, or tracts of land, comprised in the said articles, or any part thereof; nor any estate, right, interest, or possession of any of the planters, proprietors, tenants, or occupiers of any lands or tenements within the said territories, districts, or tracts of, in, or to any lands, tenements, or hereditaments lying within the same, which the parties aforesaid had not a right or power, by virtue of the respective charters or grants under which they claimed, to bind or conclude: and it was therefore decreed, that the said articles, and the several matters and things therein contained, should be performed and carried into execution by and between the said parties, and every of them; and to that end, *that the Plaintiffs T. P.* and *R. P. the father,* in their own right, *and as standing in the* place of *J. P.* deceased; *and the Defendant,* the Lord *B. should respectively,* before the end of three calendar months from that day, *execute,* under their hands and seals, two several *proper instruments, appointing and authorizing proper persons, not more than seven on each side, with full powers to the said seven persons respectively, or any three or* more of them, for the actual running, marking,
*196 and laying out * the part of a circle and the several lines in the said articles mentioned: and such commissioners were to give due notice to each other, and to fix and agree upon a time or times to begin and proceed in the running, marking, and laying out the same."

And it was further ordered, "that the same should be begun, at the furthest, some time in the month of November then next, and be proceeded in according to the said articles; and that the said lines should be marked out by visible stones, posts, trees, pillars, buildings, land marks, or other certain boundaries, which might remain and continue; and that such boundaries should be marked on one side with the arms of the Defendant the Lord *B.;* and on the other side, with the arms of the Plaintiffs the *Penns;* and that such lines should be completely so run, marked, and laid out, on or before the last day of April 1752; and when so done, that a true and exact plan and survey thereof, with the best, and most exact, and certain description that could be given of the same, should be made up, signed, and sealed by the commissioners on both sides, and by their principals, and be entered in all the public offices in the provinces of Maryland and Pennsylvania, and the three lower counties of Newcastle, Kent, and Sussex; and that a true copy of such respective instruments for appointing commissioners, when prepared, should be delivered by the solicitor of the one party, to the solicitor of the other party; and in case the parties should differ about such instruments, or either of them, the Master was to settle the same." "And two
*197 * questions in particular having been raised in America by the commissioners formerly appointed by the Defendant Lord *B.* and being then made in the cause; *viz.* where the centre of the circle, agreed by the said articles to be drawn about the town of Newcastle therein-mentioned ought to be fixed; and whether the said circle ought to be of a radius or semi-diameter of twelve miles,

or only of a periphery of twelve miles; and a third question being also made in the cause; *viz.* at what place the Cape, called in the said articles Cape Hinlopen, is situated; his Lordship declared he was of opinion, that according to the true intent and construction of the said articles, the centre of the said circle ought to be fixed in the middle of the town of Newcastle, as near as the same could be computed; and that the said circle ought to be of a radius or semi-diameter of twelve miles; and that Cape Hinlopen ought to be deemed and taken to be situated where the same is laid down and described in the map or plan annexed to the said articles to be situated; and therefore his lordship further decreed, that the said articles should be carried into execution accordingly; and that after the said limits and boundaries should be so set out and ascertained by the commissioners, the Plaintiffs *T. P.* and *R. P.* the father, in their own right, and as standing in the place of *J. P.* deceased, and the Defendant Lord *B.* should respectively release and convey to each other, and their heirs, their respective rights, titles, interests, powers, prerogatives, claims, demands, and pretensions; in or to the respective territories, districts, and lands severally allotted to them, ac-
*198 cording * to the tenth article contained in the said articles of agreement, at the costs and charges of the person or persons, to whom such release and conveyance should be made; and the Master was to settle such releases, &c., if the parties differed, &c.; and all proper parties were to join, &c. But the Decree was to be without prejudice to any prerogative, power, property, title, or interest of his Majesty, his heirs and successors, in or to the said territories, districts, or tracts of land, or any part thereof; *and also to any estate, right, interest, or possession of any of the planters, &c.* [as before]. And in case his Majesty, his heirs or successors, should insist upon any power, title, or right whatsoever, either on behalf of his Majesty, his heirs or successors, or of any of his or their subjects, residing in, or being possessed of, or interested in, any lands, tenements, or hereditaments, lying within any of the said territories, districts, or tracts of land, so as to hinder, obstruct, or interrupt the effectual execution or performance of the said articles, or any part thereof; then, and in every such case, any of the parties were to be at liberty to apply, from time to time," &c. And his Lordship reserved the consideration of any further or other directions to be given as between the Plaintiffs and the Defendant Lord *B.* and the Defendants claiming under *W. B.* Esq. deceased, upon any such application. The Defendant Lord *B.* was directed to pay the Plaintiff his costs up to the hearing, as mentioned in the report; and further directions were reserved until the time limited by the Decree for performance of the articles should be expired, &c. *Reg. Lib. ubi supra, fol.* 456, 457.[1]

[1] Pursuant to Lord Hardwicke's decree, commissioners were appointed by the proprietors of Pennsylvania and Maryland to carry into effect the Articles of Agreement of May 10, 1732, and they held their first meeting at Newcastle, Delaware, on November 15, 1750. Disputes, however, arising between them, frequent resort was made to Chancery and to the Privy Council, until finally, on the 4th of July (a day of good omen), of the year 1760, an agreement was reached between the Penns, on the one hand, and Lord Baltimore, on the other, to quote from the records of the Privy Council, "to accept the proceedings of the commissioners appointed in 1750, and the determination of the western end of the line according to the contention of the Penns: the mid-point of this line to be clearly marked and commissioners appointed within 30 days to complete the demarcation of the boundaries; and all claims were released to what should thus fall to the other party.

"Commissioners are now proceeding with the determination of the line, and with Baltimore's consent the indenture has been confirmed by the Lord Chancellor on 6 March, 1762. His Majesty's confirmation is also sought in order to quiet the minds of his subjects

State of Pennsylvania v. State of Connecticut.

Court of Commissioners Under 9th of Articles of Confederation, 1782.

[131 *United States, Appendix,* liv.]

All territory lying within the charter boundary of Pennsylvania and claimed by the State of Connecticut belongs as of right to the State of Pennsylvania.

On March 1, 1781, the Articles of Confederation went into effect, inasmuch as, on that day, the representatives of Maryland, the last of the thirteen States to sign, affixed their signatures to that instrument of government. Taking advantage of this fact, and wishing to settle the dispute with the State of Connecticut, which had already resulted in bloodshed, to certain territory claimed by Pennsylvania to be within its jurisdiction, in accordance with the 9th of the Articles of Confederation (by virtue whereof the Congress should, at the request of the agents of the States in controversy, "constitute a court for hearing and determining the matter in question"), the delegation of the State of Pennsylvania, according to the Journal of Congress of November 3, 1781, presented "a petition from the Supreme Executive Council of the Commonwealth of Pennsylvania . . . , stating a matter of dispute between the said State and the State of Connecticut, respecting sundry lands lying on the east branch of the river Susquehanna, and praying a hearing in the premises, agreeably to the 9th Article of the Confederation." This petition was read and on November 14, 1781, the Congress assigned the fourth Monday in June, 1782, for the appearance of the States by their lawful agents, and ordered notice thereof in the following form:

"By the United States in Congress assembled, in the city of Philadelphia, on the 14th day of November, in the year of our Lord 1781, and in the 6th year of Independence.

"To the legislative authority of the State of Connecticut [Pennsylvania].

"It is hereby made known that pursuant to the 9th Article of the Confederation, the Supreme Executive Council of the State of Pennsylvania have presented a petition to Congress, stating that a controversy has long subsisted between the said State of Pennsylvania and the State of Connecticut, respecting sundry lands lying within the northern boundary of the said State of Pennsylvania, and praying for a hearing in pursuance of the 9th Article of the Confederation; and that the 4th Monday in June next is assigned for the appearance of the said States of Pennsylvania and Connecticut, by their lawful agents, at the place in which Congress shall then sit, to proceed in the premises as by the said Confederation is directed."

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there, and as a further testimony that a final end and period has been put to all their contests and litigations by the agreement of 1760." (*Acts of the Privy Council, Colonial Series,* Vol. V, p. 108.)

' The line drawn between 1763 and 1767 in pursuance of this agreement of July 4, 1760, was none other than Mason & Dixon's line, from the names of the surveyors, which not only fixed the boundaries between two provinces but between freedom, on the one hand, and slavery, on the other, in the United States of America.

For the history of the controversy in the Privy Council and in Chancery, for the drawing and redrawing, marking and remarking of the original line in 1901 and 1903, see *Report on the Resurvey of the Maryland-Pennsylvania Boundary,* Maryland Geological Survey Special Publication, Vol. VII, 1908.—Editor.

Monday, June 24, 1782, being the day assigned for the appearance of
*lv the States by their agents, Messrs. William Bradford, * Joseph Reed, James Wilson and Jonathan Dickinson Sargent appeared for Pennsylvania, and their credentials were spread upon the journal. Mr. Eliphalet Dyer appeared for Connecticut, and presented credentials which were also spread upon the journal, from which it appeared that Messrs. Eliphalet Dyer, William Samuel Johnson and Jesse Root were the duly accredited agents of that State.

On the 27th of June, Connecticut moved to postpone the proceedings until "after the termination of the present war;" which motion was denied.

On the 16th of July, 1782, the agents of Pennsylvania presented new credentials, which were objected to by Connecticut. The objection was overruled, and the agents of the two States were directed to "appoint by joint consent, commissioners or judges, to constitute a court for hearing and determining the matter in question, agreeably to the 9th Article of the Confederation."

On Monday, the 12th of August, 1782, Congress was informed, by a paper signed by the agents on both sides, and spread upon the journal, that they had agreed upon the Hon. William Whipple of New Hampshire, Major-General Nathaniel Greene of Rhode Island, Hon. David Brearley[1] and William Churchill Houston, Esq., of New Jersey, Hon. Cyrus Griffin and Joseph Jones, Esq., of Virginia, and Hon. John Rutledge of South Carolina, any five or more of whom they had agreed should constitute the court, and have authority to proceed and determine the matter and difference between the States.

On the 23d of August, 1782, they reported to Congress that General Greene

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[1] It is important to note that David Brearley, one of the commissioners of the court in the case of *Pennsylvania* v. *Connecticut,* was Chief Justice of the State of New Jersey and as such had taken part in the decision of *Holmes* v. *Walton,* declaring an act of the legislature of New Jersey unconstitutional and void as in conflict with the constitution of that State. He was also a member of the Federal Constitutional Convention of 1787.

It is further of interest to observe that John Rutledge, who had been appointed a commissioner of the court but refused to serve, was at that time Governor of the State of South Carolina, and from 1784 to 1789 was a member of the State court of chancery during the period of his service as member of the Constitutional Convention of 1787. In this body he was chairman of the Committee of Detail which prepared the first draft of the Constitution, which, in its 9th article, preserved the method of settling disputes between the States by a temporary tribunal appointed by the Senate as the representative of the States under the proposed Constitution. On August 24, 1787, on the floor of the Convention, Article 9 of the draft "being taken up," to quote Madison's Notes of the Debates, Mr. Rutledge said, "this provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established, and moved to strike it out." (Madison's *Journal of the Constitutional Convention,* Hunt's ed., Vol. 2, p. 241; Farrand, *Records of the Federal Convention,* Vol. 2, p. 400.)

It thus appears that one of the proposed members of the only temporary tribunal that ever decided a case under the 9th of the Articles of Confederation proposed to change the temporary into a permanent tribunal, and, curiously enough, that the agents and counsel of the contending States in that case supported him in this endeavor. Thus, to quote Madison again, "Docr. Johnson," counsel for Connecticut, "2ded. the motion," and Mr. Wilson, counsel for Pennsylvania, to continue the quotation from Madison, "urged the striking out, the Judiciary being a better provision" (Hunt, Vol. 2, pp. 241; Farrand, Vol. 2, p. 401)—in each case a trained lawyer, for Rutledge was not merely a member of the State court of chancery, he was later Chief Justice of the Supreme Court of Carolina and Chief Justice of the Supreme Court of the United States; Dr. Johnson not only represented Connecticut in its dispute with Pennsylvania, but had successfully represented that State, when a colony, before the Privy Council; and James Wilson, successful in his representation of Pennsylvania in its controversy with Connecticut, was, after the formation of the Supreme Court of the United States, one of the original Justices of that august tribunal.—Editor.

could not attend, and that Mr. Rutledge declined, and that they had agreed upon Mr. Thomas Nelson of Virginia and Mr. Welcome Arnold of Rhode Island in their places: whereupon Congress directed commissions to issue to the judges according to the amended list. It was further agreed between the parties that the court should assemble at Trenton in New Jersey on the 12th day of the next November.

On the 28th of August the form of commission was settled, and it was spread upon the journal.

The court convened, and began its sessions at Trenton, November 12, 1782, with only Mr. Brearley and Mr. Houston present. They adjourned from day to day, up to November 18, when, enough members being present, the court was organized for work, with Mr. Whipple, Mr. Arnold, Mr. Brearley, Mr. *lvi Houston and Mr. Griffin as * its members. After some skirmishing the agents on each side, on the 22d of November, put in a written statement, showing the claims set up by their respective States.

[James Wilson for plaintiff.] Pennsylvania set up the patent of Charles II, of March 4, 1681, to William Penn, which included the disputed tract, "by which letters patent," it was averred, "the jurisdiction and right of government within the limits aforesaid, and also the right of soil, were conveyed, and under which Pennsylvania hath been held, settled and possessed." It was also charged that "sundry persons, pretending to claim, under the late colony, now State of Connecticut, before the Revolution, have violently settled themselves within the limits aforesaid, and the colony of Connecticut, by an act of their legislature, made and passed a short time before the Revolution have encouraged the said violent settlement, and intrusion, and asserted their claim as a colony to a large part of the lands within the limits aforesaid, as well in point of jurisdiction as territory; and that since the Revolution the said intrusions are continued and daily increased by the said persons pretending to claim under the State of Connecticut."

[William Samuel Johnson for defendant.] On the part of Connecticut there was set up: (1) the discovery by Sebastian Cabot, in 1497, from 25° N. to 67° 30′ N.; the designation of a part of the discovery, extending from 40° N. to 48° N. as New England, by James I, by letters patent in 1620, and the incorporation of the Council at Plymouth for governing it; (2) the grant by the Council of Plymouth to Sir Henry Roswell, etc., of the country between the Merrimack and three miles south of the southerly end of Massachusetts Bay from the Atlantic to the Western Sea, in 1628; (3) the grant by the Council of Plymouth, in 1631, to Lord Say and Seal, of that part of New England which extends from Narragansett River forty leagues upon a straight line near the sea shore, towards the southwest, west, and by south or west, as the coast lieth, towards Virginia, and all the lands north and south in latitude and longitude of the breadth aforesaid, throughout the main lands from the Western Ocean to the South Sea—on which grant the Connecticut people settled and established a government, extending their possessions to the Dutch possessions near the Hudson River, and, as early as 1650, to the west side of the Delaware River; (4) that in 1635 the Plymouth Company surrendered its charter, and the Crown granted, in 1662, new letters to John Winthrop and others, of the *lvii same tract granted to Lord Say * and Seal, the grantees to form the company and society of the colony of Connecticut, and that thereby the colony became vested with all that land, including the lands in controversy. After setting forth the settlement of New York, and its acquisition by the British Crown, and the letters patent to the Duke of York, and the adjustment of the boundary line between Connecticut and New York, the paper averred that the lands in con-

troversy to the west of New York remained in the colony of Connecticut, and that the grant by Charles II to Penn was taken by him, with a knowledge that the northern limits of his grant interfered with and spread over the lands previously granted to Connecticut. It also set forth that Connecticut had made grants of land within this tract upon the Susquehanna and Delaware rivers to settlers from Connecticut who had acquired the Indian title, and that the legislature had approved of it, and had exercised jurisdiction over them.

The hearing upon the issues thus made up lasted from day to day until the 30th December, 1782, when . . .

["The agents attending, the Court pronounced the following sentence or judgment:

"This cause has been well argued by the learned counsel on both sides.

"The court are now to pronounce their sentence or judgment.][1]

"We are unanimously of opinion that the State of Connecticut has no right to the lands in controversy.

"We are also unanimously of opinion that the jurisdiction and preëmption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania."[2]

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[1] The exact text of a portion of the sentence or judgment omitted by Mr. Bancroft Davis has been inserted in brackets from *Journals of the American Congress,* edition of 1823, Vol. IV, p. 140. The proceedings of the court were laid before the Congress on January 2, 1783, and were ordered to "be lodged among the acts of Congress." They are to be found at pp. 129–140 of this edition of the Journals of the American Congress.—Editor.

[2] This judgment settled the question of jurisdiction and preëmption, but the right of soil was still disputed by settlers who were not parties to the proceeding, and who for many years maintained a fierce struggle for their possessions, acquired under Connecticut, almost amounting to a civil war. . . .

Finally, in 1799, the legislature of Pennsylvania passed an act of compromise and conciliation, by which compensation was provided for Pennsylvania claimants, and if it appeared that a Connecticut claimant was an actual settler on the land prior to the Trenton decree, in accordance with regulations prevailing among the settlers, he received a patent from the land office by paying two dollars per acre for land of first class, one dollar and twenty cents for land of second class, fifty cents for land of third class, and eight and one-third cents for land of fourth class. Commissioners were appointed to meet at Wyoming to carry out the law, and peace was thus finally restored. Pearce's Annals of Luzerne County, pp. 58–98.

With the exception of the first paragraph and the addition of names of counsel, the statement of the case is as reported by the Honorable J. C. Bancroft Davis, Reporter of the Supreme Court of the United States, in his invaluable essay entitled "Federal Courts Prior to the Adoption of the Constitution," 131 U. S. *appendix* xix, lxiii. The first part of this essay is entitled "Courts of Appeal in Prize Cases" (xix-xlix), which gives an account of all the prize cases of the American Revolution in so far as they were appealed to the Congress and decided by its committee of appeals or its court of appeals in cases of capture. The second part is entitled "Courts for Determining Disputes and Differences between two or more States concerning Boundary Jurisdiction, or any other Cause Whatever" (lxiii), giving the details of the controversies between the States submitted to the Congress under the 9th Article of Confederation.

Inasmuch as these Federal courts prior to the adoption of the Constitution are the immediate forerunners of the Supreme Court under the more perfect Union of that instrument, two further references are added:

The Predecessor of the Supreme Court, by J. Franklin Jameson, in Essays on the Constitutional History of the United States, edited by J. Franklin Jameson, pp. 1–45. (1889.)

Hampton L. Carson, The History of the Supreme Court of the United States, 2 vols., 1902, Vol. I, pp. 39–86.

It is interesting to note, in this connection, the following statement by Mr. Justice Baldwin in delivering the opinion of the Supreme Court in *Rhode Island* v. *Massachusetts* (12 Peters, 657, 724), decided in 1838:

"It is a part of the public history of the United States, of which we cannot be judicially ignorant, that, at the adoption of the Constitution, there were existing controversies between eleven States respecting their boundaries, which arose under their respective charters and had continued from the first settlement of the colonies."—Editor.

State of New York v. State of Connecticut et al.

Supreme Court of the United States, 1799.

[4 *Dallas*, 1.]

An injunction will neither be granted by the court, nor a single judge, without reasonable notice to the adverse party, or his attorney: what is reasonable notice.

BILL in equity. "The State of *New-York*, one of the *United States* of *America*, by *Josiah Ogden Hoffman*, the attorney-general of the said state," filed this bill in consequence of the rejection of the motion, to grant writs of *certiorari*, for the removal of *Fowler et al.* v. *Lindsey et al.* and *Fowler et al.* v. *Miller* (3 *Dal. Rep.* 411) from the Circuit Court of *Connecticut* into the Supreme Court. The plaintiffs in those suits were made defendants to the present bill; and the complainant, after setting forth the title of *New-York* to the lands in question, prayed (*inter alia*) for an injunction against them. The notices to the defendants, that the injunction would be moved for, were delivered on the 25th and 26th of July; but, on the 6th of *August*,[1] *Ingersoll*, who appeared for the individuals, though not for the state, referred to the act of congress, which provides, that "no "writ of injunction shall be granted, in any case, without reasonable previous "notice to the adverse party, or his attorney of the time and place of moving for "the same:" 2 *vol.* 228. *s.* 5. *Swift's Edit.* And he contended, that reasonable notice had not been given in this case.

*2 **Hoffman*, (the attorney-general of *New-York*) contended that the notice was reasonable in relation to its present object; though it might not be sufficient for requiring the defendant to put in an answer, or demurrer to the bill. The injunction prayed for is not a perpetual one, but only till answer, and further order of the Court. Nor ought the section of the act of congress to be extended by construction; for, a universal application of the rule, would be unreasonable and, in many cases, enable the party to defeat the very purpose of an injunction. It is questionable, indeed, whether the section at all relates to a motion, either in the Supreme Court or the Circuit Court, for an injunction; since its only object seems to have been, to vest in a single Judge the same power that the Courts previously possessed, to grant the writs of injunction and *ne exeat*. But, at all events, if the Court shall think notice of such a motion necessary, they will construe the shortest notice to be reasonable notice, for the purpose of preserving peace, and effectuating justice.

Ingersoll in reply. With respect to the state of *Connecticut*, it is a fact, that since the decision on the motion for a *certiorari*, at the last term, there has not been a meeting of the legislature; so that it is impossible to ascertain what course she will adopt on the occasion: and with respect to the individual plaintiffs in the Circuit Court, it is a matter of great importance that a trial on their rights should not be suspended, by the interposition of a state, whose interests cannot be affected by any decision that may be given below. It is enough, however, that by the positive provisions of the act of congress, it is contemplated, that no injunction shall issue, in any case, unless satisfactory reasons are assigned; and that, there-

[1] The term commenced on the 5th of *August*, but a quorum of the judges did not attend till the day following; and CUSHING and IREDELL, *Justices*, were prevented by indisposition from taking their seats on the Bench, during the whole term.

fore, reasonable notice of an application for the writ, must be given to the adverse party.

The opinion of the COURT was delivered by the *Chief Justice.*

ELLSWORTH, *Chief Justice.* The prohibition contained in the statute, that writs of injunction shall not be granted, without reasonable notice to the adverse party, or his attorney, extends to injunctions granted by the Supreme Court or the Circuit Court, as well to those that may be granted by a single Judge.

The design and effect, however, of injunctions, must render a shorter notice *reasonable* notice, in the case of an application to a Court, than would be so construed, in most cases of an application to a single Judge: and, until a general rule shall be settled, the particular circumstances of each case must also be regarded.

Circumstanced as the present case is, the notice, which has been given is, in the opinion of the Court, sufficient, as it respects the parties against whom an injunction is prayed.

State of New York v. State of Connecticut, et al.

Supreme Court of the United States, 1799.

[4 *Dallas*, 3.]

An injunction will not be granted, to stay proceedings in common-law suits, at the instance of a state, not a party thereto, nor interested in their decision.

THE bill in this case contained an historical account of the title of *New-York* to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of *November* 1683, between the two states on the subject; and prayed a discovery, relief, and injunction to stay the proceeding in the *Connecticut* ejectments. 3 *Dall.* 411. As the state had not appeared, the question of injunction was the only one now argued.

Hoffman (the attorney-general of *New-York*), in support of the prayer for an injunction, and the general merits of the bill, urged various points, with great force and ability. 1st. *It is necessary to execute the special agreement between the states.* It is a principle of equity, that wherever there is an agreement, as to a right, whether it is a mere franchise, or a right of soil, it shall be enforced, and rendered conclusive upon the parties, by the interposition of the Court. The agreement admits that the tract of land belonged to *New-York;* and the bill states, that notwithstanding this admission, *Connecticut* has since undertaken to grant a part of it to the plaintiffs in the ejectments. Hence, it became necessary (or the bill would have been incomplete) to make those plaintiffs parties, to the present suit. The agreement, indeed, only gives the equitable title to *New-York;* while the plaintiffs below possess the legal title, and must, of course, recover in the ejectments. A specific performance of the agreement being decreed against *Connecticut,* would not be an adequate and complete remedy; and all parties in interest, however remote, must be brought before the court, or they cannot be affected by its proceedings. 2d. *It will prevent a multiplicity of suits.* The bill is emphatically a bill of peace; since, considering the character of the parties to the principal controversy, without this remedy, the consequences upon the public tranquillity can hardly be conjectured. It is true, however, that the right of the

state of *New-York* cannot be affected by a decision in the Circuit Court; but till that right is lawfully settled, the number of suits, by individuals, must be indefinitely great; and merely to avoid a multiplicity of suits, to cut off, by one decision, various sources of strife and litigation, is a substantive ground for the exercise of a chancery jurisdiction. 1 *Atk.* 282. 2 *Atk.* 484. 3d. *It is a bill for the discovery of title,* which parties in interest, as well as parties in pos-
*4 session, may certainly maintain. 1 *Vez.* 249.[1] 4th. *It is a bill to* * *settle a question of boundary between two states.* Of this question the Court can, incontestably, take cognizance; and it will not allow the decision of the principal matter to be interrupted, or prevented, by collateral considerations; particularly, when the decision of the principal, will settle all the inferior matters in dispute. In *Penn* v. *Baltimore,* 1 *Vez.* 454. the bill was sustained upon similar principles; and the jurisdiction there assumed upon principle, in a case of contested provincial boundary, may surely be exercised here under the additional sanction of the constitution. 2 *Dall.* 442. 415. 419. 3 *Dall.* 1. 412. But it is not simply a bill to settle a question of boundary between two states: it involves the right of soil, which, in relation to a great part of *New-York,* results from the right of jurisdiction; so that deciding the latter, is virtually a decision of the former. In this respect *New-York* is, perhaps, distinguished from her sister states, whose claims of territory are, generally, founded upon positive grant; while her claim of soil is a mere incident of the sovereignty and jurisdiction, with which the revolution invested her.[2]

Ingersoll, against granting the prayer for an injunction. In the suits below, the state of *New-York* is not a party, and cannot be affected by their decision; while the defendants below are not parties to the present bill, though they are the persons most likely to be injured by those suits. But no part of the bill states, that any of the land belongs to *New-York;* so *non constat* that she is interested in the question of soil; and the question of state boundary cannot be decided, as between the states, in the Circuit Court.[3] There is no instance
*5 of the interposition of a court * of equity, by way of injunction, unless upon the application of a party immediately interested in the subject of the common law suits, or there is property likely to be withdrawn. 1 *Ch. Prec.* 186, 7. *Gilb. Ch.* 19. 2 *Dall.* 402. 5 *Bot. Cas. Canc.* 439. *Hind. Ch.* 585. Besides, there is a regular course, in which the judgment of this court, independent of its equity character, may be obtained; as by a writ of error, on a demurrer to evidence, the construction and effect of the alleged agreement between the states, might here

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[1] WASHINGTON, *Justice.*—Does the bill state, that the plaintiff is ignorant of the defendant's title?

Hoffman. Yes, expressly.

WASHINGTON, *Justice.* Then you are aware, that if the injunction should be granted upon that ground, it must, of course, be dissolved, as soon as the discovery is obtained.

[2] PATTERSON, *Justice.* Generally speaking, the proposition is true, that, as to states, jurisdiction and the right of soil, go together.

[3] ELLSWORTH, *Chief Justice.* If the bill contains no averment of a right of soil in *New York,* I think it must be defective, and lays no foundation for an injunction. To have the benefit of the agreement between the states, the defendants below (who are the settlers of *New York*) must apply to a court of equity as well as the state herself; but, in no case, can a specific performance be decreed, unless there is a substantial right of soil, not a mere political jurisdiction, to be protected and enforced. Besides, is not the bill, likewise, defective for want of making the defendants below parties to it?

CHASE, *Justice.* The validity of the grant of either state must depend upon the question of boundary; for, neither *New York,* nor *Connecticut,* could grant land, which it did not own. Hence, I think, the question of boundary must necessarily arise in the suits below.

PATTERSON, *Justice.* On the question just proposed by the Chief Justice, it may be remarked, that some difficulty would occur in sustaining a bill in this court, at the suit of the defendants below. But it does not appear to me, that any of the cases in the books apply to

be revised, and authoritatively declared; and "suits in equity cannot be sustained in any Court of the *United States,* in any case where plain, adequate, and complete remedy, may be had at law:"[1] 1 *vol.* 59. *s.* 16. *Cowp.* 215, 6. 2 *H. Black.* 187. An eventual responsibility cannot constitute a party to the suits below. The several states should, in justice, refund the price of the confiscated estates, if those, who have now brought suits against the purchasers under their respective laws, should succeed; and *Pennsylvania* was bound, in honour, to compensate General *Irwine* for the loss of *Montour's* island, on the failure of the title derived from her grant: 3 *Dall. Rep.* 425. but, surely, such considerations will not constitute parties to a judicial proceeding. As to a discovery of title, by whom, and against whom, is it sought? One party to the suit, does not require it from another; but a third person requires it, in a suit, to which he is not a party, and the decision in which cannot affect his right, whatever it may be.

Lewis, for the complainant, in reply. The difficulties of the case are obvious to all; and, unless the present remedy is applied, the difficulties will dangerously increase. If the lands are not in *Connecticut,* the ejectments are *coram non judice.* If they are not in *New-York,* suits there would be equally objectionable. Neither state will be satisfied, however, by the judgment of a Court held in the other; and for want of a peaceful forum to decide the controversy, an odious and vindictive litigation may be perpetuated. But this Court has a constitutional jurisdiction on a question of boundary between states; and, upon such an occasion, will be eager to exercise it. The interest of *New-York,* too, is sufficient to justify the exercise of it, upon her application. The right and possession of a sovereign state, are not to be treated like the usufructuary right, the *possessio pedis,* of a farmer. A sovereign state possesses what she governs. But is not *New-York* interested, even in a pecuniary point of view, so as to claim the interposition
*6 * of this Court, to which her settlers, the defendants below, cannot originally resort? It is a fundamental principle of the law of nature and of nations, that every government is bound to preserve peace and order, to protect individuals, to indemnify those who trust to its faith, and to prevent a dismemberment of its territory. This political and moral obligation, enforced by a regard to her public improvements, and fiscal operations, creates an interest of the highest character in the government of *New-York;* and such as the Court will cherish with all its benevolence and authority. 21 *Vin. Abr.* 181. *pl.* 1. *Ibid.* 183. *pl.* 4. 5. 7. *Ibid. pl.* 8, 11. 3 *Black. Com.* 255, 6.

THE COURT, after advisement, delivered their opinion, that as the State of *New-York* was not a party to the suits below, nor interested in the decision of those suits, an injunction ought not to issue.

Injunction refused.[2]

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the present case. What does the bill present? A case of disputed boundaries between two states; and the question of soil, on their conflicting grants, must be decided by the question of jurisdiction. The state of *Connecticut* has granted out the *Gore.* The State of *New-York* has, also, granted out the *Gore.* The grantees of *Connecticut* have brought suits in *Connecticut* against the grantees of *New-York,* and will obtain possession of the land. If the grantees of *New-York* are thus evicted, they will bring suits in *New-York,* and, on their possession. But where will this feud and litigation end? It is difficult and painful to conjecture, unless this Court can, under the constitution, lay hold of the case to decide the question of boundary, which will be a decision of all the appendages and consequences.

[1] PATTERSON, *Justice.* The rule was so before, and is so independent of the provision in the act of Congress.

[2] *Hoffman.* In every grant by *New-York,* there is a reservation of gold and silver mines, and of five acres per cent. for roads. The bill might, besides, be amended, by averring the state to be interested in a *residuum* of the land, if that would be sufficient to sustain

State of New York v. State of Connecticut, et al.

Supreme Court of the United States, 1799.

[4 *Dallas*, 6.]

A *subpœna* in equity must be served sixty days before the return-day.

As the state of *Connecticut* did not appear, *Hoffman* moved that she should appear on the first day of next term, or that the plaintiff be then at liberty to proceed *ex parte*. 3 *Dal.* 335. But *Lewis* observed, that the rule required that a *subpoena* issuing in a suit in equity, should be served sixty days before the return; which had not been done in the present case. The first motion was, thereupon, waived; and an *alias subpoena* awarded. 3 *Dall.* 320.

State of New Jersey, Complainant, v. State of New York, Defendant.

Supreme Court of the United States, 1830.

[3 *Peters*, 461.]

The subpœna issued on the filing of a bill in which the state of New Jersey was complainant and the state of New York was defendant, was served upon the governor and attorney general of New York, sixty days before the return day, the day of the service and return inclusive. A second subpœna issued, which was served on the governor of New York only, the attorney general being absent. There was no appearance by the state of New York.

By the Court: This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the governor, and on the attorney general. A service on one is not sufficient to entitle the court to proceed.

Upon an application by the counsel for the state of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the state of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely ex parte, the court could not feel bound by its decision if the state of New York desired to have the question again argued.

A notice was given by the solicitors for the state of New Jersey to the governor of the state of New York, dated the 12th of January 1830, stating that a bill had been filed on the equity side of the supreme court, by the state of New Jersey, against the people of the state of New York, and that on the 13th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards,

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the prayer for an injunction.

WASHINGTON, *Justice*. The amendment would not satisfy me; for, my opinion is founded upon the fact, that *New-York* is not interested in the suits below.

CHASE, *Justice*. It is a mere bill to settle boundaries; and we must take it as we find it, not as it might be made.

ELLSWORTH, *Chief Justice*. If there had been a quorum of judges, without my attendance, I should have declined sitting in this cause. As it is, I am glad that the opinion of my brethren, dispenses with the necessity of my taking a part in the decision.

on the day appointed, no counsel having appeared for the state of New York, on the motion of the counsel for the state of New Jersey, for a subpœna to be served on the governor and the attorney general of the state of New York; the court said: as no counsel appears to argue the motion on the part of the state of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an ex parte argument in favor of their authority to grant the subpœna, but will follow the precedent heretofore established. The state of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do.

A BILL was filed on the equity side of the court, by the state of New Jersey, on the 20th of February 1829, against the people of the state of New York; and on motion of Mr. Wirt for the complainants, a subpœna was awarded by the court on the 16th of March 1829. The writ issued on the 26th of May 1829. A *462 copy of the subpœna and of the bill * was served on the attorney general of New York, personally, on the 5th day of June 1829, by the marshal of the southern district of New York, and on the acting governor of the state, by transmitting the same to him by letter. The acting governor acknowledged "due service of the same," by an indorsement on the subpœna, signed by him on the 5th day of June 1829.

The subpœna was returnable on the first Monday in August 1829, being the third day of that month, and fifty-nine days after the service. And no appearance having been entered for the defendants, on the 6th of October 1829 an alias subpœna was issued, returnable to January term 1830. This writ was served on the acting governor of New York on the 9th of November 1829, sixty-one days before the term, by delivering a true copy of the same to him. The marshal of the southern district of New York returned, as to the attorney general of New York, "the attorney general of New York, Greene C. Bronson, Esq. not found, being absent, and not within my district."

Together with the alias subpœna, there was served on the acting governor of the state of New York, in the manner before stated, a notice signed by the solicitor for the complainants, in the following terms:

"To Enos T. Throop, Esquire, governor of the state of New York.

By virtue of a writ of subpœna to you directed and herewith shown, you are required to be and appear, on behalf of the people of the state of New York, before the supreme court of the United States holding pleas in equity, on the second Monday in January next, at the city of Washington, in the district of Columbia, being the present seat of the national government of the United States, to answer concerning those things which shall be objected to the said state, in a bill in equity now depending in the said court, wherein the state of New Jersey is complainant, and the people of the state of New York are defendants, to do and receive, on behalf of the state of New York, what further the said court *463 shall have considered in this behalf. * And this you may in no wise omit, under the penalty of five hundred dollars, dated the first Monday of August, in the year of our Lord 1829."

A similar notice was issued, directed to the attorney general of New York, but was not served upon him.

No appearance having been filed on the 12th of January 1830, Mr. Southard, attorney general of New Jersey, and Mr. Wirt, solicitors for the complainants,

addressed to the governor of the state and the attorney general of New York the following letter:

"A bill having been filed on the equity side of the supreme court of the United States, by the state of New Jersey against the people of the state of New York, a copy whereof, with the usual and regular process of subpœna to appear and answer the said bill, having been duly served upon you, and you having failed to appear on the return day of the said process, notice is hereby respectfully given to you, that we, as solicitors for the state of New Jersey, complainant in the said bill, will move the said supreme court of the United States, on Saturday the 13th of February next, to proceed *ex parte* in the said cause, and to take the said bill pro confesso, and render a decree in conformity with the prayer thereof, according to the rules of practice established in the said court, or for such other order as to the said court may seem meet; unless, on or before the said 13th of February next, you shall have appeared and answered the said bill, or shall show sufficient cause to the contrary."

This letter was delivered to the attorney general of New York, then in the city of Washington, on the 13th of January 1830, and to the governor of the state on the 21st of January 1830.

The motion of the solicitors for the plaintiffs coming on for argument, on the 13th of February 1830; Mr. Wirt said, that there are two questions to be presented: the first, whether there had been a sufficient service of the subpœna, supposing the court to have jurisdiction to issue it without an act of congress?

The second was, whether such jurisdiction existed.

*464 * The first subpœna was served upon the governor and attorney general sixty days before the return day, the day of the service and of the return inclusive. Whether this was sufficient, according to the course of the court, he was desirous to know. The second subpœna was served on the governor only; the attorney general being absent. Was it necessary, to make the service good, that it should be served upon both? Mr. Wirt referred to the rules of the court on this subject, particularly the rule adopted in August term 1796.

Mr. Chief Justice MARSHALL said, that this was not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule was to be upon the governor and upon the attorney general. A service on one was not sufficient to entitle the court to proceed against the state.

Mr. Wirt then said, that he should be glad to have a day assigned to argue the point of jurisdiction, if the court chose, before another subpœna issued; as it might, if decided against the plaintiffs, prevent unnecessary expenses. He would be willing that it should be at so distant a day, as to enable the state of New York to appear and employ counsel. He mentioned three weeks from the day of the application.

Mr. Chief Justice MARSHALL said, the court had no difficulty in assigning that day for the motion. It might be as well to give notice to the state of New

York, as they might employ counsel in the interim. If, indeed, the argument should be merely ex parte, the court would not feel bound by its decision; if the state of New York afterwards desired to have the question again argued.[1]

Motion granted, and notice directed.

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[1] The following letters, addressed by the attorney general of New York to the clerk of the court, dated July 27th, 1829, and to the chief justice and the associate justices, dated January 8th, 1830, were read during the discussion.

Utica, N. Y. July 27, 1829.

William Thomas Carroll, Esquire, Clerk of the Supreme Court of the United States.

SIR,

The governor and the attorney general of the state of New York were recently served with the copy of a bill in equity, said to have been exhibited in the supreme court of the United States, by "The State of New Jersey *vs.* The People of the State of New York," and with a subpœna in that cause to appear on the first Monday of August next.

I beg leave respectfully to say, that such service is regarded on the part of the state of New York as utterly void, because the mode adopted is unknown to the common law, is not authorised by any statute of the United States, nor warranted by any existing rule or order of the court out of which the process issued. A rule on the subject of the service of process was adopted in August term 1796, 3 Dall. Rep. 320, 335; but this rule, so far as I have observed, has been omitted in every subsequent publication of the rules of the supreme court; and is no doubt obsolete.

Entertaining this view of the subject, it is supposed that no proceeding will be had in the cause, either in vacation or at term, until the court shall have directed the mode of serving such process, and the prescribed course shall have been pursued.

Whether the court has been clothed with power to compel the appearance of a state as defendant in an original suit or proceeding, is a question, among others, which will no doubt receive from that high tribunal all the consideration that its importance demands, before any order shall be made in the premises.

I will thank you to hand this to the court, if the subject shall ever be presented to their consideration, and should any rule or order be made in, or affecting, this cause, please send a certified copy addressed to me at Albany.

I am, Sir, with great respect,

Your obedient servant,

GREEN C. BRONSON,
Attorney General of New York.

Washington City, January 8, 1830.

To the Honourable the Chief Justice, and his Associate Justices of the Supreme Court of the United States.

A bill has been exhibited in this court by the state of New Jersey, against the people of the state of New York, concerning the boundary line between the two states and a subpœna to appear and answer, with a copy of the bill, has been served upon the governor of the state of New York. A notice has recently been served, that on the 18th instant the court would be moved to take the bill *pro confesso*, and proceed to a decree for the want of an appearance. I beg leave respectfully to say, that the opinion is entertained on the part of the state of New York, that this court cannot exercise jurisdiction in such a case without the authority of an act of congress for carrying into execution that part of the judicial power of the United States which extends to controversies between two or more states.

The governor of the state of New York has made a communication upon the subject of this suit to the legislature now in session; but it has not yet been acted upon, so far as I have been advised. Whether the legislature will authorise any person to appear and discuss the question of jurisdiction; or whether, for the purpose of obtaining a judicial decision upon the merits of an unfortunate controversy, they will order an appearance, waiving the question of jurisdiction, I am at this time, unable to determine.

I have deemed it proper to make this communication, to explain what might otherwise be supposed a want of respect for this honourable court, on the part of the executive of New York.

GREEN C. BRONSON,
Attorney General of New York.

*465 * In conformity with the direction of the court, notice of the day ap-
*466 pointed for hearing the motion for a subpœna was * forthwith served on the governor, and on the attorney general of the state of New York; and on the day assigned by the court, the 6th of March, 1830, Mr. Southard, attorney general of the state of New Jersey, and Mr. Wirt, attended as counsel for the complainants. No counsel appeared for the state of New York.

The counsel for the state of New Jersey inquired of the court if they would hear an argument on the motion that a subpœna might issue to be served on the governor and attorney general of the state of New York, stating that they were willing and prepared to go into the same.

Mr. Chief Justice MARSHALL said, as no one appears to argue the motion on the part of the state of New York, and the precedent for granting the process has been established upon very grave and solemn argument, in the case of Chisholm *vs.* State of Georgia, 2 Dall. Rep. 419, and Grayson *vs.* State of Virginia, 3 Dall. 320, the court do not think it proper to require an ex parte argument in favour of their authority to grant the subpœna, but will follow the precedent heretofore established.

The court are the more disposed to adopt this course, as the state of
*467 New York will still be at liberty to contest the * proceeding at a future time in the course of the cause, if it shall choose to insist upon the objection.

ON consideration of the motion made by Messrs Southard and Wirt, solicitors for the complainants in this cause, on Saturday the 13th day of February of the present term of this court, praying the court to postpone the consideration of this cause until Saturday the 6th of March of the present term of this court, with leave to the counsel for the said complainant on that day either to argue the point of jurisdiction, or to move the court for a decree in pursuance of the notice therein recited, or for new process in case the court should determine that the service of the process in this case was not sufficient to entitle the court to proceed against the state of New York, or for such other order as to the court may seem meet: it is considered by the court, that as no one appears to argue this motion on the part of the state of New York, and the precedent has been established in the case of Chisholm's Executors against the State of Georgia, the court do not consider it proper to require an ex parte argument, but will follow the precedent so established after grave and solemn argument. The court is the more disposed to adopt this course, as the state of New York will be at liberty to contest this proceeding at any time in the course of the cause, Whereupon, it is ordered by the court that, as the service of the former process in this cause was defective inasmuch as it was not served sixty days before the return day thereof, as required by the rules of this court, process of subpœna be, and the same is hereby awarded as prayed for by the complainant.[1]

[1] The following is a copy of the subpœna awarded by the court:

The president of the United States to the governor and the attorney general of the state of New York, greeting:—For certain causes offered before the supreme court of the United States, holding jurisdiction in equity, you are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse, you personally be and appear, on behalf of the people of the said state of New York, before the said supreme court, holding jurisdiction in equity, on the first Monday in August next, at
*468 the city of Washington, in the * district of Columbia, being the present seat of the national government of the United States, to answer concerning the things which shall

Cherokee Nation v. State of Georgia.

Supreme Court of the United States, 1831.

[5 *Peters,* 1.]

Motion for an injunction to prevent the execution of certain acts of the legislature of the state of Georgia in the territory of the Cherokee nation of Indians, on behalf of the Cherokee nation; they claiming to proceed in the supreme court of the United States, as a foreign state against the state of Georgia under the provision of the constitution of the United States, which gives to the court jurisdiction in controversies in which a state of the United States or the citizens thereof, and a foreign state, citizens, or subjects thereof, are parties.

The Cherokee nation is not a foreign state, in the sense in which the term "foreign state" is used in the constitution of the United States.

The third article of the constitution of the United States describes the extent of the judicial power. The second section closes an enumeration of the cases to which it extends, with "controversies between a state or the citizens thereof, and foreign states, citizens or subjects. A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party—the state of Georgia may then certainly be sued in this court.

The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any indi-
*2 vidual of their community. Laws have * been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state; and the courts are bound by those acts.

The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two peoples in existence. In general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government. It may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title, independent of their will, which must take effect in point of possession, when the right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

The bill filed on behalf of the Cherokees seeks to restrain a state from the forcible exer-

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then and there be objected to the said state, and to do further and receive on behalf of the said state, what the said supreme court, holding jurisdiction in equity, shall have considered in this behalf; and this you may in no wise omit, under the penalty of five hundred dollars. Witness, the honourable John Marshall, Esquire, chief justice of the said supreme court, at Washington city, the second Monday in January, being the 11th day of said month, in the year of our Lord 1830, and of the independence of the United States the fifty-fourth.

WILLIAM THOMAS CARROLL,
Clerk of the Supreme Court of the United States.

For the final phase of this case see *New Jersey* v. *New York* (5 Peters, 284), *post* p. 666.—Editor.

cise of legislative power over a neighbouring people asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual power of self government in their own country, by the Cherokee nation, this court cannot interpose, at least in the form in which those matters are presented. That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps, be decided by this court, in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power, to be within the proper province of the judicial department.

This case came before the court on a motion on behalf of the Cherokee nation of Indians for a subpœna, and for an injunction, to restrain the state of Georgia, the governor, attorney-general, judges, justices of the peace, sheriffs, deputy sheriffs, constables, and others the officers, agents, and servants of that state, from executing and enforcing the laws of Georgia or any of these laws, or serving process, or doing any thing towards the execution or enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation.

*3 The motion was made, after notice, and a copy of the bill * filed at the instance and under the authority of the Cherokee nation, had been served on the governor and attorney-general of the state of Georgia on the 27th December 1830, and the 1st of January 1831. The notice stated that the motion would be made in this court on Saturday, the 5th day of March 1831. The bill was signed by John Ross, principal chief of the Cherokee nation, and an affidavit, in the usual form, of the facts stated in the bill was annexed; which was sworn to before a justice of the peace of Richmond county, state of Georgia.

The bill set forth the complainants to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this Union, nor to any prince, potentate or state, other than their own."

"That from time immemorial the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized by the United States, in the various treaties subsisting between their nation and the United States."

That the Cherokees were the occupants and owners of the territory in which they now reside, before the first approach of the white men of Europe to the western continent; "deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs." Composing the Cherokee nation, they and their ancestors have been and are the sole and exclusive masters of this territory, governed by their own laws, usages, and customs.

The bill states the grant, by a charter, in 1732, of the country on this continent lying between the Savannah and Altamaha rivers, by George the Second, "monarch of several islands on the eastern coast of the Atlantic," the same country being then in the ownership of several distinct, sovereign and independent nations of Indians, and amongst them the Cherokee nation.

The foundation of this charter, the bill states was asserted to be the right of

discovery to the territory granted; a ship manned by the subjects of the king having, "about two centuries and a half before, sailed along the coast of
*4 the western hemisphere, from the 56th to the 38th degree of north * latitude, and looked upon the face of that coast without even landing on any part of it." The right, as affecting the right of the Indian nation, the bill denied; and asserted that the whole length to which the right of discovery is claimed to extend among European nations is to give to the first discoverer the prior and exclusive right to purchase these lands from the Indian proprietors, against all other European sovereigns: to which principle the Indians have never assented; and which they deny to be a principle of natural law of nations, or obligatory on them.

The bill alleges, that it never was claimed under the charter of George the Second, that the grantees had a right to disturb the self government of the Indians who were in possession of the country; and that, on the contrary, treaties were made by the first adventurers with the Indians, by which a part of the territory was acquired by them for a valuable consideration; and no pretension was ever made to set up the British laws in the country owned by the Indians. That various treaties have been, from time to time, made between the British colony in Georgia; between the state of Georgia, before her confederation with the other states; between the confederate states afterwards; and, finally, between the United States under their present constitution, and the Cherokee nation, as well as other nations of Indians: in all of which the Cherokee nation, and the other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory. That the various proceedings from time to time had by the congress of the United States under the articles of their confederation, as well as under the present constitution of the United States, in relation to the subject of the Indian nations; confirmed the same view of the subject.

The bill proceeds to refer to the treaty concluded at Hopewell on the 28th November 1785, "between the commissioners of the United States and headmen and warriors of all the Cherokees;" the treaty of Holston of the 22d July 1791, "between the president of the United States, by his duly authorized commissioner, William Blount, and the chiefs and warriors of the Cherokee
*5 nation of Indians," and the additional * article of 17th November 1792, made at Philadelphia by Henry Knox, the secretary at war, acting on behalf of the United States; the treaty made at Philadelphia, on the 26th June 1794; the treaties between the same parties made at Tellico 2d October 1790; on the 24th October 1804; on the 25th October 1805, and on the 27th October 1805; the treaty at Washington, on the 7th January 1806, with the proclamation of that convention by the president, and the elucidation of that convention of 11th September 1807; the treaty between the United States and the Cherokee nation made at the city of Washington the 22 day of March 1816; another convention made at the same place, on the same day, by the same parties; a treaty made at the Cherokee agency, on the 8th of July 1807; and a treaty made at the city of Washington on the 27th February 1819: "all of which treaties and conventions were duly ratified and confirmed by the senate of the United States, and became thenceforth, and still are, a part of the supreme law of the land."

By those treaties the bill assserts the Cherokee nation of Indians are acknowledged and treated with as sovereign and independent states, within the boundary

arranged by those treaties: and that the complainants are, within the boundary established by the treaty of 1719, sovereign and independent; with the right of self government, without any right of interference with the same on the part of any state of the United States. The bill calls the attention of the court to the particular provisions of those treaties, "for the purpose of verifying the truth of the general principles deduced from them."

The bill alleges, from the earliest intercourse between the United States and the Cherokee nation, an ardent desire has been evinced by the United States to lead the Cherokees to a greater degree of civilization. This is shown by the 14th article of the treaty of Holston; and by the course pursued by the United States in 1808, when a treaty was made, giving to a portion of the nation which preferred the *hunter state* a territory on the west of the Mississippi, in exchange for a part of the lower country of the Cherokees; and assurances were given by the president that those who chose to remain for the purpose of engaging in the pursuits of agricultural and civilized life, in the country they occupied,
*6 might rely "on the * patronage, aid and good neighbourhood of the United States." The treaty of 8th July 1817 was made to carry those promises into effect; and in reliance on them a large cession of lands was thereby made: and in 1819, on the 27th February, another treaty was made, the preamble of which recites that *a greater part* of the Cherokee nation had expressed an earnest desire to remain on this side of the Mississippi, and were desirous *to commence those measures which they deem necessary to the civilization and preservation of their nation;* to give effect to which object, without delay, that treaty was declared to be made; and another large cession of their lands was, thereby, made by them to the United States.

By a reference to the several treaties, it will be seen that a fund is provided for the establishment of schools; and the bill asserts that great progress, has been made by the Cherokees in civilization and in agriculture.

They have established a constitution and form of government, the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments have all been organized. They have formed a code of laws, civil and criminal, adapted to their situation; have erected courts to expound and apply those laws, and organized an executive to carry them into effect. They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state, and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States.

Under the promised "patronage and good neighbourhood" of the United States, a portion of the people of the nation have become civilized Christians and agriculturists; and the bill alleges, that in these respects they are willing to submit to a comparison with their white brethren around them.

The bill claims for the Cherokee nation the benefit of the provision in the constitution; that treaties are the supreme law of the land; and all judges are bound thereby: of the declaration in the constitution, that no state shall
*7 pass any law * impairing the obligation of contracts: and avers that all the treaties referred to are contracts of the highest character and of the most solemn obligation. It asserts that the constitutional provision, that con-

gress shall have power to regulate commerce with the Indian tribes, is a power which from its nature is exclusive; and consequently, forbids all interference by any one of the states. That congress have, in execution of this power, passed various acts, and among others the act of 1802, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." The object of these acts are to consecrate the Indian boundary as arranged by the treaties; and they contain clear recognitions of the sovereignty of the Indians, and of their exclusive right to give and to execute the law within that boundary.

The bill proceeds to state that, in violation of these treaties, of the constitution of the United States, and of the act of congress of 1802, the State of Georgia, at a session of her legislature held in December, in the year 1828, passed an act, which received the assent of the governor of that state on the 20th day of that month and year entitled, "an act to add the territory lying within the chartered limits of Georgia, now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and for other purposes." That afterwards, to wit in the year 1829, the legislature of the said state of Georgia passed another act, which received the assent of the governor on the 19th December of that year, entitled, "an act to add the territory lying within the chartered limits of Georgia, now in the occupancy of the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and to annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal processes in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1828 on this subject."

The effect of these laws, and their purposes, was stated to be, to parcel out the territory of the Cherokees; to extend all the laws of Georgia over the same; to abolish the Cherokee laws, and to deprive the Cherokees of the protec-
*8 tion of their laws; * to prevent them, as individuals, from enrolling for emigration, under the penalty of indictment before the state courts of Georgia; to make it murder in the officers of the Cherokee government to inflict the sentence of death in conformity with the Cherokee laws, subjecting them all to indictment therefor, and death by hanging; extending the jurisdiction of the justices of the peace of Georgia into the Cherokee territory, and authorising the calling out of the militia of Georgia to enforce the process; and finally, declaring that no Indian, or descendant of any Indian, residing within the Cherokee nation of Indians, shall be deemed a competent witness in any court of the state of Georgia, in which a white person may be a party, except such white person reside within the said nation.

All these laws are averred to be null and void: because repugnant to treaties in full force; to the constitution of the United States; and to the act of congress of 1802.

The bill then proceeds to state the interference of president Washington for the protection of the Cherokees, and the resolutions of the senate in consequence of his reference of the subject of intrusions on their territory. That in 1802, the state of Georgia, in ceding to the United States a large body of lands within her alleged chartered limits, and imposing a condition that the Indian title should be peaceably extinguished, admitted the subsisting Indian title. That ces-

sions of territory have always been voluntarily made by the Indians in their national character; and that cessions have been made of as much land as could be spared, until the cession of 1819, "when they had reduced their territory into as small a compass as their own convenience would bear; and they then accordingly resolved to cede no more." The bill then refers to the various applications of Georgia to the United States to extinguish the Indian title by force, and her denial of the obligations of the treaties with the Cherokees; although under these treaties large additions to her disposable lands had been made; and states, that presidents Monroe and Adams, in succession, understanding the articles of cession and agreement between the state of Georgia and the United States in the year 1802, as binding the United States to extinguish the Indian title, so soon only as it could be done *peaceably* and on *reasonable terms;* refused, themselves, to apply force to these * complainants, or to permit it to be applied by the state of Georgia, to drive them from their possession; but, on the contrary, avowed their determination to protect these complainants by force, if necessary, and to fulfill the guarantee given to them by the treaties.

*9

The state of Georgia, not having succeeded in these applications to the government of the United States, had resorted to legislation, intending to force, by those means, the Indians from their territory. Unwilling to resist by force of arms these pretensions and efforts, the bill states, that application for protection, and for the execution of the guarantee of the treaties, has been made by the Cherokees to the present president of the United States, and they have received for answer, "that the president of the United States has no power to protect them against the laws of Georgia."

The bill proceeds to refer to the act of congress of 1830, entitled "an act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi." The act is to apply to such of the Indians as may *choose* to remove, and by the proviso to it, nothing contained in the act shall be construed as authorising or directing the violation of any existing treaty between the United States and any of the Indian tribes.

The complainants have not chosen to remove, and this, it is alleged, it is sufficient for the complainants to say: but they proceed to state, that they are fully satisfied with the country they possess; the climate is salubrious; it is convenient for commerce and intercourse; it contains schools, in which they can obtain teachers from the neighbouring states, and places for the worship of God, where Christianity is taught by missionaries and pastors easily supplied from the United States. The country, too, "is consecrated in their affections from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives, and friends." Little is known of the country west of the Mississippi; and if accepted, the bill asserts, it would be the grave not only of their civilization and Christianity, but of the nation itself.

*10

It also alleges that the portion of the nation who emigrated * under the patronage and sanction of the president in 1808 and 1809, and settled on the territory assigned to them on the Arkansas river, were afterwards required to move again; and that they did so, under the stipulations of a treaty made in May 1828. The place, to which they removed under this last treaty, is said

to be exposed to incursions of hostile Indians, and that they are "engaged in constant scenes of killing and scalping, and have to wage a war of extermination with more powerful tribes, before whom they will ultimately fall." They have, therefore, decidedly rejected the offer of exchange. The bill then proceeds to state various acts, under the authority of the laws of Georgia, in defiance of the treaties referred to, and of the constitution of the United States, as expressed in the act of 1802; and that the state of Georgia has declared its determination to continue to enforce these laws so long as the complainants shall continue to occupy their territory.

But while these laws are enforced in a manner the most harassing and vexatious to your complainants, the design seems to have been deliberately formed to carry no one of these cases to final decision in the state courts; with the view, as the complainants believe and therefore allege to prevent any one of the Cherokee defendants from carrying those cases to the supreme court of the United States, by writ of error for review, under the twenty-fifth section of the act of congress of the United States passed in the year 1789, and entitled "an act to establish the judicial courts of the United States."

Numerous instances of proceedings are set forth at large in the bill. The complainants expected protection from these unconstitutional acts of Georgia, by the troops of the United States; but notice has been given by the commanding officer of those troops to John Ross, the principal chief of the Cherokee nation, that "these troops, so far from protecting the Cherokees, would co-operate with the civil officers of Georgia, in enforcing their laws upon them." Under these circumstances it is said that it cannot but be seen that unless this court shall interfere, the complainants have but these alternatives: either to surrender their lands in exchange for others in the western wilds of this continent, which would be to seal, at once, the doom of their civilization, Christianity, and
*11 * national existence; or to surrender their national sovereignty, their property, rights and liberties, guarantied as these now are by so many treaties, to the rapacity and injustice of the state of Georgia; or to arm themselves in defence of these sacred rights, and fall sword in hand, on the graves of their fathers.

These proceedings it is alleged are wholly inconsistent with equity and good conscience, tend to the manifest wrong of the complainants; and violate the faith of the treaties to which Georgia and the United States are parties, and of the constitution of the United States. These wrongs are of a character wholly irremediable by the common law; and these complaints are wholly without remedy of any kind, except by the interposition of this honourable court.

The bill avers that this court has, by the constitution and laws of the United States, original jurisdiction of controversies between a state and a foreign state, without any restriction as to the nature of the controversy; that, by the constitution treaties are the supreme law of the land. That as a foreign state, the complainants claim the exercise of the powers of the court to protect them in their rights, and that the laws of Georgia, which interfere with their rights and property, shall be declared void, and their execution be perpetually enjoined.

The bill states that John Ross is "the principal chief and executive head of the Cherokee nation;" and that, in a full and regular council of that nation, he

has been duly authorized to institute this and all other suits which may become necessary for the assertion of the rights of the entire nation.

The bill then proceeds in the usual form to ask an answer to the allegations contained in it, and "that the said state of Georgia, her governor, attorney-general, judges, magistrates, sheriffs, deputy sheriffs, constables, and all other her officers, agents, and servants, civil and military, may be enjoined and prohibited from executing the laws of that state within the boundary of the Cherokee territory, as subscribed by the treaties now subsisting between the United States and the Cherokee nation, or interfering in any manner with the rights of self government possessed by the Cherokee nation within the limits of their territory, as defined by the treaty; that the two laws of Georgia before mentioned as having been
*12 passed in the years * 1828 and 1829 may, by the decree of this honourable court, be declared unconstitutional and void; and that the state of Georgia, and all her officers, agents, and servants may be forever enjoined from interfering with the lands, mines, and other property, real and personal, of the Cherokee nation, or with the persons of the Cherokee people, for, or on account of any thing done by them within the limits of the Cherokee territory; that the pretended right of the state of Georgia to the possession, government, or control of the lands, mines, and other property of the Cherokee nation, within their territory, may, by this honourable court, be declared to be unfounded and void, and that the Cherokees may be left in the undisturbed possession, use, and enjoyment of the same, according to their own sovereign right and pleasure, and their own laws, usages, and customs, free from any hindrance, molestation, or interruption by the state of Georgia, her officers, agents, and servants; that these complainants may be quieted in the possession of all their rights, privileges, and immunities, under their various treaties with the United States; and that they may have such other and farther relief as this honourable court may deem consistent with equity and good conscience, and as the nature of their case may require."

On the day appointed for the hearing, the counsel for the complainants filed a supplemental bill, sworn to by Richard Taylor, John Ridge and W. S. Coodey of the Cherokee nation of Indians, before a justice of peace of the county of Washington in the district of Columbia.

The supplemental bill states, that since their bill, now submitted, was drawn, the following acts, demonstrative of the determination of the state of Georgia to enforce her assumed authority over the complainants and their territory, property, and jurisdiction, had taken place.

The individual, in that bill called Corn Tassel, and mentioned as having been arrested in the Cherokee territory under process issued under the laws of Georgia, has been actually hung; in defiance of a writ of error allowed by the chief justice of this court to the final sentence of the court of Georgia in his case. That writ of error having been received by the governor of the state was, as the complainants are informed and believed, immediately communicated by him to the
*13 legislature of the * state, then in session; who promptly resolved, in substance, that the supreme court of the United States had no jurisdiction over the subject, and advised the immediate execution of the prisoner, under the sentence of the state court; which accordingly took place.

The complainants beg leave farther to state, that the legislature of the state

of Georgia, at the same session, passed the following laws, which have received the sanction of the governor of the state.

"An act to authorize the survey and disposition of lands within the limits of Georgia, in the occupancy of the Cherokee tribe of Indians, and all other unlocated lands within the limits of the said state, claimed as Creek land; and to authorize the governor to call out the military force to protect surveyors in the discharge of their duties: and to provide for the punishment of persons who may prevent, or attempt to prevent any surveyor from performing his duties, as pointed out by this act, or who shall wilfully cut down or deface any marked trees, or remove any land-marks which may be made in pursuance of this act; and to protect the Indians in the peaceable possession of their improvements, and of the lots on which the same may be situate." Under this law it was stated that the lands within the boundary of the Cherokee territory are to be surveyed, and to be distributed by lottery among the people of Georgia.

At the same session, the legislature of Georgia passed another act entitled, "an act to declare void all contracts hereafter made with the Cherokee Indians, so far as the Indians are concerned;" which act received the assent of the governor of the state on the 23d December, 1830.

The legislature of Georgia, at its same session, passed another law, entitled, "an act to prevent the exercise of assumed and arbitrary power by all persons under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered
*14 * limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory."

At the same session of its legislature, the state of Georgia passed another act, entitled "an act to authorize the governor to take possession of the gold, silver, and other mines, lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing any person or persons who may hereafter be found trespassing upon the mines."

The supplemental bill further states the proceedings of the governor of Georgia, under these laws; and that he has stationed an armed force of the citizens of Georgia, at the gold mines within the territory of the complainants, who are engaged in enforcing the laws of Georgia. Additional acts of violence and injustice are said to have been done under the authority of the laws of Georgia, and by her officers and agents, within the Cherokee territory.

The complainants allege that the several legislative acts, herein set forth and referred to, are in direct violation of the treaties enumerated in their bill, to which this was a supplement, as well as in direct violation of the constitution of the United States, and the act of congress passed under its authority in the year 1802, entitled, "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

They pray that this supplement may be taken and received as a part of their bill; that the several laws of Georgia herein set forth may be declared by the decree of this court to be null and void, on the ground of the repugnancy to the constitution, laws, and treaties set forth above, and in the bill to which this was a supplement; and that these complainants may have the same relief by injunction

and a decree of peace, or other wise, according to equity and good conscience, against these laws, as against those which are the subject of their bill as first drawn.

The case was argued on the part of the complainants by Mr. Sergeant and Mr. Wirt.

No counsel appeared for the state of Georgia.

*15 * For the complainant it was contended,

1. That the parties before the court were such as, under the constitution, to give to this court original jurisdiction of the complaint made by the one against the other.

2. That such a *case* or *controversy*, of a judicial nature, was presented by the bill, as to warrant and require the interposition of the authority of the court.

3. That the facts stated by the complainants exhibited such a case in equity, as to entitle them to the specific remedy by the injunction prayed for in the bill.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees, as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof, and foreign states, citizens, or subjects." A subsequent clause of the same section gives the

*16 supreme court original jurisdiction in all * cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible

in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a state of the Union, and have insisted that individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely, before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

*17 * The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political

*18 connexion with them, would * be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the Union to controversies between a state or the citizens thereof, and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term *foreign state,* were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

*19 The counsel for the plaintiffs contend that the words * "Indian tribes" were introduced into the article, empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in view of the convention; this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In com-

mon language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. *"Foreign nations"* is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations;" not we presume because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention, the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context
*20 force that * construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court, in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

Mr. Justice JOHNSON.—In pursuance of my practice in giving an opinion on all constitutional questions, I must present my views on this. With the morality of the case I have no concern; I am called upon to consider it as a legal question.
*21 * The object of this bill is to claim the interposition of this court, as the means of preventing the state of Georgia, or the public functionaries of

the state of Georgia, from asserting certain rights and powers over the country and people of the Cherokee nation.

It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an original suit to this court.

It is essential to such suit that a state of this Union should be a party; so says the second member of the second section of the third article of the constitution: the other party must, under the control of the eleventh amendment, be another state of the Union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.

Two preliminary questions then present themselves.

1. Is the complainant a foreign state in the sense of the constitution?

2. Is the case presented in the bill one of judicial cognizance?

Until these questions are disposed of, we have no right to look into the nature of the controversy any farther than is necessary to determine them. The first of the questions necessarily resolves itself into two.

1. Are the Cherokees a state?

2. Are they a foreign state?

1. I cannot but think that there are strong reasons for doubting the applicability of the epithet *state* to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states. Until then I must
*22 think that we cannot recognise it as an existing state, * under any other character than that which it has maintained hitherto as one of the Indian tribes or nations.

There are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. 1. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered. When the populous and civilized nations beyond the Cape of Good Hope were visited, the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government; the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation, in which the right of sovereignty is mentioned as a part of the matter ceded.

It may be suggested that there were uniformly cessions of land without inhabitants; and, therefore, words competent to make a cession of sovereignty

were unnecessary. This, however, is not a full answer, since soil, as well as people, is the object of sovereign action, and may be ceded with or without the sovereignty, or may be ceded with the express stipulation that the inhabitants shall remove. In all the cessions to us from the civilized states of the old world, and of our transfers among ourselves, although of the same property, under the same circumstances, and even when occupied by these very Indians, the express cession of sovereignty is to be found.

In the very treaty of Hopewell, the language or evidence of which is appealed to as the leading proof of the existence if this supposed state, we find the commissioners of the United States expressing themselves in these terms. "The commissioners plenipotentiary of the United States give peace to all the
*23 Cherokees, and receive them into the favor and protection of the * United States *on the following conditions.*" This is certainly the language of sovereign and conquerors, and not the address of equals to equals. And again, when designating the country they are to be confined to, comprising the very territory which is the subject of this bill, they say, "Art. 4. *The boundary allotted to the Cherokees for their hunting grounds" shall be as* therein described. Certainly this is the language of concession on our part, not theirs; and when the full bearing and effect of those words, "for their hunting grounds," is considered, it is difficult to think, that they were then regarded as a state, or even intended to be so regarded. It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the states, or United States, over the territory within their limits. The pre-emptive right, and exclusive right of conquest in case of war, was never questioned to exist in the States, which circumscribed the whole or any part of the Indian grounds or territory. To have taken it from them by direct means would have been a palpable violation of their rights. But every advance, from the hunter state to a more fixed state of society, must have a tendency to impair that pre-emptive right, and ultimately to destroy it altogether, both by increasing the Indian population, and by attaching them firmly to the soil. The hunter state bore within itself the promise of vacating the territory, because when game ceased, the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character of the pre-emptive right.

But it is said, that we have extended to them the means and inducement to become agricultural and civilized. It is true: and the immediate object of that policy was so obvious as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was
*24 wise * to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogteher baffled. But the project of ultimately organizing them into states, within the

limits of those states which had not ceded or should not cede to the United States the jurisdiction over the Indian territory within their bounds, could not possibly have entered into the contemplation of our government. Nothing but express authority from the states could have justified such a policy, pursued with such a view.

To pursue this subject a little more categorically.

If these Indians are to be called a state: then,

1. By whom are they acknowledged as such?
2. When did they become so?
3. And what are the attributes by which they are identified with other states?

As to the first question, it is clear, that as a state they are known to nobody on earth, but ourselves, if to us: how then can they be said to be recognized as a member of the community of nations? Would any nation on earth treat with them as such? Suppose when they occupied the banks of the Mississippi or the sea coast of Florida, part of which in fact the Seminoles now occupy, they had declared war and issued letters of marque and reprisal against us or Great Britain, would their commissions be respected? If known as a state, it is by us and us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of *the Indians;* not even nation or state: but regards them as what they were, a band of hunters, occupying *as hunting grounds,* just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them, in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper: amounting in terms to a
*25 relinquishment of all * power, legislative, executive and judicial, to the United States, is yielded in the ninth article.

It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate. There is nothing express and nothing implied, that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.

There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission.

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death; and have

recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a state.

But secondly, at what time did this people acquire the character of a state?

Certainly not by the treaty of Hopewell; for every provision of that treaty operates to strip it of its sovereign attributes; and nothing subsequent adds any thing to that treaty, except using the word *nation* instead of *Indians*. And as to that article in the treaty of Holston, and repeated in the treaty of Tellico, which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell on what principle can it be contended that the guarantee can go further than to secure to them that right over the territory, which is conceded by the Hopewell treaty; which interest is
*26 only that of *hunting grounds*. The general policy of the * United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question.

If they were not regarded as one of the family of nations at the time of that treaty, even though at that time first subdued and stripped of the attributes of a state, it is clear that, to be regarded now as a state, they must have resumed their rank among nations at some subsequent period. But at *what* subsequent period? Certainly by no decisive act until they organized themselves recently into a government; and I have before remarked that, until expressly recognized by the executive under that form of government, we cannot recognize any change in their form of existence. Others have a right to be consulted on the admission of new states into the national family. When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain from that time blotted them from among the race of sovereigns. From that time Great Britain considered them as her subjects whenever she chose to claim their allegiance and their country as hers, both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary; and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so.

And, thirdly, by what attributes is the Cherokee nation identified with other states?

The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it; and has never since been recognized as in them, otherwise than as dependent upon the will of a superior.

The right of legislation is in terms conceded to congress by the treaty of Hopewell, whenever they choose to exercise it. And the right of soil is held by the feeble tenure of hunting grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia.

They have in Europe sovereign and demi-sovereign states and states
*27 of doubtful sovereignty. But this state, if it be * a state, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence.

However, I will enlarge no more upon this point; because I believe, in one view and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least while they occupy a country within our limits. Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty, except as to their land and trade.

But in no sense can they be deemed a foreign state, under the judiciary article.

It does seem unnecessary on this point to do more than put the question, whether the makers of the constitution could have intended to designate them, when using the epithets "foreign" and "state." State, and foreign state, are used in contradistinction to each other. We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations; and yet we were not admitted until we had declared ourselves no longer provinces but states, and shown some earnestness and capacity in asserting our claim to be enfranchised. Can it then be supposed, that when using those terms we meant to include any others than those who were admitted into the community of nations, of whom most notoriously the Indians were no part?

The argument is that they were states; and if not states of the Union, must be foreign states. But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held
*28 together only by ties of blood and habit, and * having neither laws nor government beyond what is required in a savage state. The distinction is clearly made in that section which vests in congress power to regulate commerce between the United States with foreign nations and the Indian tribes.

The language must be applied in one of three senses; either in that of the law of nations, or of the vernacular use, or that of the constitution. In the first, although it means any state not subject to our laws, yet it must be a state and not a hunter horde: in the vernacular, it would not be applied to a people within our limits and at our very doors: and in the constitution the two epithets are used in direct contradistinction. The latter words were unnecessary, if the first included the Indian tribes. There is no ambiguity, though taken literally; and if they were, facts and circumstances altogether remove it.

But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether, and put my rejection of this motion upon the nature of the claim set up, exclusively.

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject, that I can perceive, in which a court of justice can take jurisdiction of

the questions made in the bill. The substance of its allegations may be thus set out.

That the complainants have been from time immemorial lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty and by laws of the United States. That within those limits they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That in violation of their just rights so secured to them, the state of Georgia has passed laws, authorizing and requiring the executive and judicial powers of the state to enter their territory and put down their public functionaries. That in pursuance of those laws the functionaries of Georgia have entered their territory, with an armed force, and put down all powers legislative, executive and judicial, exercised under the government of the Indians.

*29 What does this series of allegations exhibit but a state * of war, and the fact of invasion? They allege themselves to be a sovereign independent state, and set out that another sovereign state has, by its laws, its functionaries, and its armed force, invaded their state and put down their authority. This is war in fact; though not being declared with the usual solemnities, it may perhaps be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum and tuum* in the judicial but in the political sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibilities; to right himself, and not to appeal to any arbiter but the sword, for the justice of his cause. If the state of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case. In the Nabob of Arcot's Case (4 Bro. Cha. Ca. and 1 and 2 Vesey Jun.), a case of a political character not one half so strongly marked as this; the courts of Great Britain refused to take jurisdiction, because it had its origin in treaties entered into between sovereign states: a case in which the appeal is to the sword and to Almighty justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation.

But there is still another ground in this case, which alone would have prevented me from assuming jurisdiction; and that is the utter impossibility of doing justice, at least even-handed justice, between the parties. As to restoring the complainant to the exercise of jurisdiction, it will be seen at once that this is no case for the action of a court; and as to quieting him in possession of the soil, what is the case on which the complainant would have this court to act? Either the Cherokee nation are a foreign state, or they are not. If they are not, then they cannot come here; and if they are, then how can we extend our jurisdiction into their country?

We are told that we can act upon the public functionaries in the state of Georgia, without the limits of the nation. But suppose that Georgia should file a cross-bill, as she certainly may, if we can entertain jurisdiction in this case; and should in her bill, claim to be put in possession of the whole Indian

*30 country; and we should decide in her favour; how is * that decree to be carried into effect? Say, as to soil; as to jurisdiction, it is not even to be considered. From the complainant's own showing, we could not do justice be-

tween the parties. Nor must I be considered as admitting that this court could even upon the other alternative exercise a jurisdiction over the person, respecting lands under the jurisdiction of a foreign nation. I know of no such instance. In Penn *vs.* Lord Baltimore, the persons were in England and land within the king's dominions though in America.

There is still another view in which this cause of action may be considered in regard to its political nature. The United States finding themselves involved in conflicting treaties, or at least in two treaties respecting the same property, under which two parties assert conflicting claims; one of the parties, putting itself upon its sovereign right, passes laws which in effect declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws by means of physical force; and the other party appeals to the executive department for protection. Being disappointed there, the party appeals to this court, indirectly to compel the executive to pursue a course of policy, which his sense of duty or ideas of the law may indicate should not be pursued. That is, to declare war against a state, or to use the public force to repel the force and resist the laws of a state, when his judgment tells him the evils to grow out of such a course may be incalculable.

What these people may have a right to claim of the executive power is one thing: whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government; which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty.

There is then a great deal of good sense in the rule laid down in the Nabob of Arcot's Case, to wit, that as between sovereigns, breaches of treaty were not breaches of contract cognizable in a court of justice; independent of the general principle that for their political acts, states were not amenable to tribunals of justice.

*31 * There is yet another view of this subject, which forbids our taking jurisdiction. There is a law of the United States, which purports to make every trespass set out in the bill to be an offense cognizable in the courts of the United States. I mean the act of 1802, which makes it penal to violate the Indian territory.

The infraction of this law is in effect the burden of complaint. What then in fact is this bill, but a bill to obtain an injunction against the commission of crimes? If their territory has been trespassed upon against the provisions of that act, no law of Georgia could repeal that act or justify the violation of its provisions. And the remedy lies in another court and form of action, or another branch of jurisprudence.

I cannot take leave of the case without one remark upon the leading argument, on which the exercise of jurisdiction here over cases occurring in the Indian country has been claimed for the complainant. Which was, that the United States in fact exercised jurisdiction over it by means of this and other acts, to punish offences committed there.

But this argument cannot bear the test of principle. For the jurisdiction of a country may be exercised over her citizens wherever they are, in right of their

allegiance; as it has been in the instance of punishing offenses committed against the Indians. And also, both under the constitution and the treaty of Hopewell, the power congress extends to regulating their trade, necessarily within their limits. But this cannot sanction the exercise of jurisdiction beyond the policy of the acts themselves which are altogether penal in their provisions.

I vote for rejecting the motion.

Mr. Justice BALDWIN.—As jurisdiction is the first question which must arise in every cause, I have confined my examination of this, entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court in dismissing the bill, but not for the reasons assigned.

In my opinion there is no plaintiff in this suit; and this opinion precludes any examination into the merits of the bill, or the weight of any minor objec-
*32 tions. My judgment stops * me at the threshold, and forbids me to examine into the acts complained of.

As the reasons for the judgment of the court seem to me more important than the judgment itself, in its effects on the peace of the country and the condition of the complainants, and as I stand alone on one question of vital concern to both; I must give my reasons in full. The opinion of this court is of high authority in itself; and the judge who delivers it has a support as strong in moral influence over public opinion, as any human tribunal can impart. The judge, who stands alone in decided dissent on matters of the infinite magnitude which this case presents, must sink under the continued and unequal struggle; unless he can fix himself by a firm hold on the constitution and laws of the country. He must be presumed to be in the wrong, until he proves himself to be in the right. Not shrinking even from this fearful issue, I proceed to consider the only quetsion which I shall ever examine in relation to the rights of Indians to sue in the federal courts, until convinced of my error in my present convictions.

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the constitution, applies to all the tribes with whom the United States have held treaties: for if one is a foreign nation or state, all others in like condition must be so in their aggregate capacity; and each of their subjects or citizens, aliens, capable of suing in the circuit courts. This case then is the case of the countless tribes, who occupy tracts of our vast domain; who, in their collective and individual characters, as states or aliens, will rush to the federal courts in endless controversies, growing out of the laws of the states or of congress.

In the spirit of the maxim *obsta principiis,* I shall first proceed to the consideration of the proceedings of the old congress, from the commencement of the revolution up to the adoption of the constitution; so as to ascertain whether the Indians were considered and treated with as tribes of savages, or independent nations, foreign states on an equality with any other foreign state or nation; and whether Indian affairs were viewed as those of foreign *nations,* and in connection with this view, refer to the acts of the federal government on the same subject.

*33 * In 1781 (1 Laws U. S. 586, &c.) a department for foreign affairs

was established, to which was entrusted all correspondence and communication with the ministers or other officers of foreign powers, to be carried on through that office; also with the governors and presidents of the several states; and to receive the applications of all foreigners, letters of sovereign powers, plans of treaties, conventions, &c. and other acts of congress relative to the department of foreign affairs; and all communications as well to as from the United States in congress assembled were to be made through the secretary, and all papers on the subject of foreign affairs to be addressed to him. The same department was established under the present constitution in 1789, and with the same exclusive control over all the foreign concerns of this government with foreign states or princes. 2 Laws U. S. 6, 7. In July 1775, congress established a department of Indian affairs, to be conducted under the superintendence of commissioners. 1 Laws U. S. 597. By the ordinance of August 1786, for the regulation of Indian affairs, they were placed under the control of the war department 1 Laws U. S. 614, continued there by the act of August 1789 (2 Laws U. S. 32, 33), under whose direction they have ever since remained. It is clear then, that neither the old or new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states, or princes.

I will next inquire how the Indians were considered; whether as independent nations or tribes, with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on; believing it requires no reasoning to prove that the omission of the words *prince, state, sovereignty,* or *nation,* cannot divest a contracting party of these
*34 national * attributes, which are inherent in sovereign power pre and self existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.

The proceedings of the old congress will be found in 1 Laws U. S. 597, commencing 1st. June 1775, and ending 1st September 1788, of which some extracts will be given. 30th June 1775, "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians. As the Indians depend on the colonists for arms, ammunition and clothing, which are become necessary for their subsistence." "That the commissioners have power to treat with the Indians;" "to take to their assistance gentlemen of influence among the Indians." "To preserve the confidence and friendship of the Indians, and prevent their suffering for want of the necessaries of life, £40,000. sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians without a license;" "traders shall sell their goods at reasonable prices; allow them to the Indians for their skins, and take no advantage of their distress and intemperance;" "the trade to be only at posts designated by the commissioners." Specimens of the kind of intercourse between the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion.

In 1782, a committee of congress report, that all the lands belonging to the Six Nations of Indians have been in due form put under the crown as appendant to the government of New York, so far as respects jurisdiction only; that that colony has borne the burthen of protecting and supporting the Six Nations of Indians and their tributaries for one hundred years, as the dependents and allies of that government; that the crown of England has always considered and treated the country of the Six Nations as one appendant to the government of New York; that they have been so recognized and admitted by their public acts by Massachusetts, Connecticut, Pennsylvania, Maryland and Virginia; that by accepting this cession, the jurisdiction of the whole western territory, belonging to the Six Nations and their tributaries, will be vested in the United States, greatly to
*35 the advantage of the Union [p. 606]. The cession alluded to is the * one from New York, March 1st, 1781, of the soil and jurisdiction of all the land in their charter west of the present boundary of Pennsylvania (1 Laws U. S. 471), which was executed in congress and accepted.

This makes it necessary to break in on the historical trace of our Indian affairs, and follow up this subject to the adoption of the constitution. The cession from Virginia in 1784 was of soil and jurisdiction. So from Massachusetts in 1785, from Connecticut in 1800, from South Carolina in 1787, from Georgia in 1802. North Carolina made a partial cession of land, but a full one of her sovereignty and jurisdiction of all without her present limits in 1789. 2 Laws United States 85. Some states made reservations of lands to a small amount, but, by the terms of the cession, new states were to be formed within the ceded boundaries, to be admitted into the Union on an equal footing with the original states; of course, not shorn of their powers of sovereignty and jurisdiction within the boundaries assigned by congress to the new states. In this spirit congress passed the celebrated ordinance of July 1787, by which they assumed the government of the north western territory, paying no regard to Indian jurisdiction, sovereignty, or their political rights, except providing for their protection; authorizing the adoption of laws "which, for the prevention of crimes and injuries, shall have force in all parts of the district; and for the execution of process, civil and criminal, the governor has power to make proper division thereof." 1 Laws United States, 477. By the fourth article the *said territory,* and the states which may be formed therein, shall for ever remain a part of this confederacy of the United States; subject to the articles of confederation, alterations constitutionally made, the acts and ordinances of congress.

This shows the clear meaning and understanding of all the ceding states, and of congress, in accepting the cession of their western lands up to the time of the adoption of the constitution. The application of these acts to the provisions of [the constitution will be considered hereafter. A few more references to the proceedings of] the old congress in relation to the Indian nation will close this view of the case.

*36 * In 1782, a committee, to whom was referred a letter from the secretary at war, reported, "that they have had a conference with the two deputies from the Catawba nation of Indians; that their mission respects certain tracts of land reserved for their use in the state of South Carolina, which they wish may be so secured to their *tribe,* as not to be intruded into by force, nor alienated even with their own consent:—whereupon, resolved, that it be recommended to

the legislature of South Carolina to take such measures for the satisfaction and security of the said tribe, as the said legislature shall in their wisdom think fit." 1 Laws United States, 667. After this, the Catawbas cannot well be considered an independent nation or foreign state. In September 1783, shortly after the preliminary treaty of peace, congress, exercising the powers of acknowledged independence and sovereignty, issued a proclamation beginning in these words: "whereas, by the ninth of the articles of confederation, it is, among other things declared, that the United States, in congress assembled, have the sole and exclusive right and power of regulating the trade, and managing all affairs with the Indians not members of any of the states, provided that the legislative right of every state, within its own limits, be not infringed or violated," prohibiting settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving gifts of land, without the express authority and directions of the United States in congress assembled. Conventions were to be held with the Indians in the northern and middle departments for the purpose of receiving them into the favour and protection of the United States, and of establishing boundary lines of *property*, for separating and dividing the settlements of the citizens from the Indian villages and hunting-grounds, &c. "Resolved that the preceding measures of congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits. Resolved, that it will be wise and necessary, to erect a district of the western territory into a distinct government, and that a committee be appointed to prepare a plan for a temporary government until the inhabitants shall form a "permanent *37 constitution * for themselves, and as citizens of a free, sovereign, and independent state, be admitted to a representation in the Union." In 1786, a general ordinance was passed for the regulation of Indian affairs under the authority of the ninth article of the confederation, which throws much light on our relations with them. P. 614. It closes with a direction, that in all cases where transactions with any nation or tribe of Indians shall become necessary for the purposes of the ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent within whose district the same shall happen, shall act in conjunction with the authority of such state.

After accepting the cession of the soil and jurisdiction of the western territory, and resolving to form a temporary government, and create new, free, sovereign, and independent states, congress resolved, in March 1785, to hold a treaty with the western Indians. They gave instructions to the commissioners in strict conformity with their preceding resolutions, both of which were wholly incompatible with the national or sovereign character of the Indians with whom they were about to treat. They will be found in pages 611, &c. and need not be particularized.

I now proceed to the instructions which preceded the treaty of Hopewell with the complainants, the treaty, and the consequent proceedings of congress. On the 15th March 1785, commissioners were appointed to treat with the Cherokees and other Indians, southward of them, within the limits of the United States, or who have been at war with them, for the purpose of making peace with them, and of receiving them into the favour and protection of the United States, &c. They were instructed to demand that all prisoners, negroes, and other property

taken during the war be given up; to inform the Indians of the great occurrences of the last war; of the extent of country relinquished by the late treaty of peace with Great Britain; to give notice to the governors of Virginia, North and South Carolina and Georgia that they may attend if they think proper: and were authorized to expend four thousand dollars in making presents to the Indians; a matter well understood in making Indian treaties, but unknown at least in
*38 our treaties with foreign nations princes * or states, unless on the Barbary coast. A treaty was accordingly made in November following, between the commissioners plenipotentiaries of the United States of the one part, and the head men and warriors of all the Cherokees of the other. The word *nation* is not used in the preamble nor any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation or foreign state or a tribe of Indians from the terms of the treaty, its stipulations and conditions. "The Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States." Art. 3d. 1 Laws U. S. 322. "The boundary allotted to the Cherokees for their hunting grounds between the said Indians and the citizens of the United States, within the limits of the United States, in and shall be the following," viz. (as defined in Article 4th). "For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States in congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper." Article 9. "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice whenever they think fit to congress." Article 12th.

This treaty is in the beginning called "Article:" the word "treaty" is only to be found in the concluding line, where it is called *"this definite treaty."* But article or treaty, its nature does not depend upon the name given it. It is not negotiated between ministers on both sides representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character; holds the lands they occupy as an allotment of hunting grounds; give to congress the exclusive right of regulating their trade, and managing all their affairs, as they may think proper. So it was understood by congress as declared by them in their proclamation of 1st September 1788 (1 Laws U. S. 619, and so understood at the adoption of the constitution.

*39 *The meaning of the words "deputy to congress" in the twelfth article may be as a person having a right to sit in that body, as at that time, it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister. But if the former was the meaning of the parties, it is conclusive to show that he was not and could not be the deputy of a foreign state wholly separated from the Union. If he sat in congress as a deputy from any state, it must be one having a political connection with, and within the jurisdiction of the confederacy; if as a diplomatic agent, he could not represent an independent or sovereign nation, for all such have an unquestioned right to send such agents when and where they please. The securing the right by an express stipulation of the treaty; the declared objects in conferring the right especially when connected with the ninth

article; show beyond a doubt it was not to represent a foreign state or nation or one to whom the least vestige of independence or sovereignty as to the United States appertained. There can be no dependence so antinational, or so utterly subversive of national existence as transferring to a foreign government the regulation of its trade, and the management of all their affairs, at their pleasure. The nation or state, tribe or village, head men or warriors of the Cherokees, call them by what name we please, call the articles they have signed a definitive treaty or an indenture of servitude; they are not by its force or virtue a foreign state capable of calling into legitimate action the judicial power of this Union, by the exercise of the original jurisdiction of this court against a sovereign state, a component part of this nation. Unless the constitution has imparted to the Cherokees a national character never recognized under the confederation; and which if they ever enjoyed was surrendered by the treaty of Hopewell; they cannot be deemed in this court plaintiffs in such a case as this.

In considering the bearing of the constitution on their rights, it must be borne in mind, that a majority of the states represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that congress asserted as to the ceded, and the states as to the unceded territory, their right to the soil absolutely
*40 and the dominion in full sovereignty, * within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on and appendant to the state governments: that before the convention acted, congress had erected a government in the north western territory containing numerous and powerful nations or tribes of Indians, whose jurisdiction was continued and whose sovereignty was overturned, if it ever existed, except by permission of the states or congress, by ordaining that the territorial laws should extend over the whole district; and directing divisions for the execution of civil and criminal process in every part; that the Cherokees were then dependents, having given up all their affairs to the regulation and management of congress, and that all the regulations of congress, over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants, that whenever their population and circumstances would admit they should form constitutions and become free, sovereign and independent states on equal footing with the old component members of the confederation; that by the existing regulations and treaties, the Indian tenure to their lands was their allotment as hunting grounds without the power of alienation, that the right of occupancy was not individual, that the Indians were forbidden all trade or intercourse with any person not licensed or at a post not designated by regulation; that Indian affairs formed no part of the foreign concerns of the government, and that though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because congress did not think proper to exercise the sole and exclusive right, declared and asserted in all their regulations from 1775 to 1788, in the articles of confederation, in the ordinance of 1787 and the proclamation of 1788; which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785, as conferred on congress to be exercised as they should think proper.

To correctly understand the constitution, then, we must read it with refer-

ence to this well known existing state of our relations with the Indians; the United States asserting the right of soil, sovereignty, and jurisdiction, in full dominion; the Indians occupant of allotted hunting grounds.

*41 We can thus expound the constitution without a reference * to the definitions of a state or nation by any foreign writer, hypothetical reasoning, or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the Union, in a written fundamental law. Whether it is the emanation from the people or the states, is a moot question, having no bearing on the supremacy of that supreme law which from a proper source, has rightfully been imposed on us by sovereign power. Where its terms are plain, I should, as a dissenting judge, deem it judicial sacrilege to put my hands on any of its provisions, and arrange or construe them according to any fancied use, object, purpose, or motive, which, by an ingenious train of reasoning, I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide to my faith, my reason, and judicial oath. In taking out, putting in, or varying the plain meaning of a word or expression, to meet the results of my poor judgment, as to the meaning and intention of the great charter, which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. I will not add unto these things; I will not take away from the words of this book of prophecy; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of names; the decisions of foreign courts; or a reference to books or writers. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages, and settled principles of this government, as administered by its fathers before the adoption of the constitution: and refer to the received opinion and fixed understanding of the high parties who adopted it; the usage and practice of the new government acting under its authority; and the solemn decisions of this court, acting under its high powers and responsibility: nothing fearing that in so doing, I can discover some sound and safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and state governments, and all tribunals acting under their authority. They will, at

*42 least enable me to judge of the true meaning and * spirit of plain words, put into the forms of constitutional provisions, which this court in the great case of Sturges and Crowninshield say, "is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable." But the absurdity and injustice of applying the provision to the case must be so monstrous, that all mankind would without hesitation, unite in rejecting the application. 4 Wheat. 202, 3.

In another great case, Cohens *vs.* Virginia, this court say, "the jurisdiction of this court then, being extended by the letter of the constitution to all cases

arising under it or under the laws of the United States, it follows that those, who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." 6 Wheat. 379, 80.

The principle of these cases is my guide in this. Sitting here, I shall always bow to such authority; and require no admonition to be influenced by no other, in a case where I am called on to take a part in the exercise of the judicial power over a sovereign state.

Guided by these principles, I come to consider the third clause of the second section of the first article of the constitution; which provides for the apportionment of representatives, and direct taxes "among the several states which may be included within this Union, according to their respective numbers, *excluding Indians not taxed.*" This clause embraces not only the old but the new states to be formed out of the territory of the United States, pursuant to the resolutions and ordinances of the old congress, and the conditions of the cession from the states, or which might arise by the division of the old. If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole
*43 free Indian * population of all the states would be included in the federal numbers, coextensively with the boundaries of all the states, included in this Union. The insertion of this clause conveys a clear definite declaration that there were no independent sovereign nations or states, foreign or domestic, within their boundaries, which should exclude them from the federal enumeration, or any bodies or communities within the states, excluded from the action of the federal constitution unless by the use of express words of exclusion.

The delegates who represented the states in the convention well knew the existing relations between the United States and the Indians, and put the constitution in a shape for adoption calculated to meet them; and the words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article shows most distinctly the sense of the convention in authorising congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usage under the old government: characterized by the names of nations, towns, villages, tribes, head men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule, and applying the word nation to the Catawbas as well as the Cherokees. The framers of the constitution have thought proper to define their meaning to be, that they were not foreign nations nor states of the Union, but Indian tribes; thus declaring the sense in which they should be considered under the constitution, which refers to them as tribes only, in this clause. I cannot strike these words from the book; nor construe Indian tribes in this part of the constitution to mean a sovereign state under the first clause of the second section of the third article. It would be taking very great liberty in the exposition of a fundamental law, to bring the Indians under the action of the legislative power as tribes, and of the judicial, as foreign states. The power conferred to regulate commerce with the Indian tribes, is the same given to the old congress by the ninth article of the old confederation, "to regu-

late trade with the Indians." The raising the word "trade" to the dignity
*44 of commerce, * regulating it with Indians or Indian tribes, is only a change of words. Mere phraseology cannot make Indians nations, nor Indian tribes foreign states.

The second clause of the third section of the fourth article of the constitution is equally convincing. "The congress shall have power to dispose of, and make all needful regulations and rules respecting the territory of the United States." What that territory was, the rights of soil, jurisdiction, and sovereignty claimed and exercised by the states and the old congress, has been already seen. It extended to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction. It is the same power which was delegated to the old congress, and, according to the judicial interpretation given by this court in Gibbons *vs.* Ogden, 9 Wheaton, 209, the word "to regulate" implied in its nature full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory, leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations *respecting* the territory of the United States; they necessarily include complete jurisdiction. It was necessary to confer it without limitation, to enable the new government to redeem the pledge given by the old in relation to the formation and powers of the new states. The saving of "the claims" of "any particular states" is almost a copy of a similar provision, part of the ninth article of the old confederation; thus delivering over to the new congress the power to regulate commerce with the Indian tribes, and regulate the territory they occupied, as the old had done from the beginning of the revolution.

The only remaining clause of the constitution to be considered is the second clause in the sixth article. "All treaties made, or to be made, shall be the supreme law of the land."

In Chirac *vs.* Chirac, this court declared that it was unnecessary to inquire into the effect of the treaty with France in 1778 under the old confederation, because the confederation had yielded to our present constitution, and this treaty had been the supreme law of the land. 2 Wheaton, 271. I consider
*45 * the same rule as applicable to Indian treaties, whether considered as national compacts between sovereign powers, or as articles, agreements, contracts or stipulations on the part of this government, binding and pledging the faith of the nation to the faithful observance of its conditions. They secure to the Indians the enjoyment of the rights they stipulate to give or secure, to their full extent, and in the plentitude of good faith; but the treaties must be considered as the rules of reciprocal obligations. The Indians must have their rights; but must claim them in that capacity in which they received the grant or guarantee. They contracted by putting themselves under the protection of the United States, accepted of an allotment of hunting grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the

right of sending a deputy of their own choice to congress. If, then, the Indians claim admission to this court under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity.

The legislation of congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles, which prevailed in the old congress and under the old confederation. In order to give full effect to the ordinance of 1787, in the north west territory, it was adapted to the present constitution of the United States in 1789, 2 Laws U. S. 33; applied as the rule for its government to the territory south of the Ohio in 1790, except the sixth article, 2 Laws U. S. 104; to the Mississippi territory in 1798, 3 Laws U. S. 39, 40; and with no exception to Indiana in 1800, 3 Laws U. S. 367; to Michigan in 1805, 3 Laws U. S. 632; to Illinois in 1809, 4 Laws U. S. 198.

In 1802 congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations, 3 Laws U. S. 460, et seq. In the same year Georgia ceded her lands west of her
*46 present boundary to the United States; and by the * second article of the convention the United States ceded to Georgia whatever claim, right or title they may have to the jurisdiction or soil of any lands south of Tennessee, North or South Carolina and east of the line of the cession by Georgia. So that Georgia now has all the rights attached to her by her sovereignty within her limits, and which are saved to her by the second section of the fourth article of the constitution, and all the United States could cede either by their power over the territory or their treaties with the Cherokees.

The treaty with the Cherokees, made at Holston in 1791, contains only one article which has a bearing on the political relations of the contracting parties. In the second article the Cherokees stipulate "that the said Cherokee nation will not hold any treaty with any foreign power, individual state, *or with individuals of any state.*" 1 Laws U. S. 326. This affords an instructive definition of the words *nation* and *treaty*. At the treaty of Hopewell the Cherokees, though subdued and suing for peace, before divesting themselves of any of the rights or attributes of sovereignty which this government ever recognized them as possessing by the consummation of the treaty, contracted in the name of the head men and warriors of all the Cherokees; but at Holston in 1791, in abandoning their last remnant of political right, contracted as the Cherokee nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual: this consideration will divest words of their magic.

In thus testing the rights of the complainants as to their national character by the old confederation, resolutions and ordinances of the old congress, the provisions of the constitution, treaties held under the authority of both, and the subsequent legislation thereon, I have followed the rule laid down for my guide by this court, in Foster *vs.* Elam, 2 Peters 307, in doing it according to the principles established by the political department of the government. "If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. However individual judges may construe them (treaties), it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." That the existence of foreign states can-
*47 not be known to this court judicially except by some * act or recognition

of the other departments of this government is, I think, fully established in the case of Palmer, 3 Wheaton, 634, 5; The Pastora, 4 Wheaton, 63; and The Anna, 6 Wheaton, 193.

I shall resort to the same high authority as the basis of my opinion on the powers of the state governments. "By the revolution, the duties as well as the powers of government devolved on the people of [Georgia] New Hampshire. It is admitted that among the latter were comprehended the transcendent powers of parliament, as well as those of the executive department." Dartmouth College *vs.* Woodward, 4 Wheat. 451, 4 Wheaton, 192; Green *vs.* Biddle, 8 Wheat. 98; Ogden *vs.* Saunders, 12 Wheat. 254, &c. "The same principle applies though with no greater force to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal regulations are to each other foreign." Buckner *vs.* Findley, 2 Peters 591. The powers of government, which thus devolved on Georgia by the revolution over her whole territory, are unimpaired by any surrender of her territorial jurisdiction, by the old confederation or the new constitution, as there was in both an express saving, as well as by the tenth article of amendments.

But if any passed to the United States by either, they were retroceded by the convention of 1802. Her jurisdiction over the territory in question is as supreme as that of congress over what the nation has acquired by cession from the states, or treaties with foreign powers, combining the rights of the state and general government. Within her boundaries there can be no other nation, community, or sovereign power, which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognized by the constitution, and every department of this government acting under its authority. Foreign states cannot be created by judicial construction; Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat. I find no acknowledgement of it by the legislative or
*48 executive power. * Until they have done so, I can stretch forth no arm for their relief without violating the constitution. I say this with great deference to those from whom I dissent; but my judgment tells me, I have no power to act, and imperious duty compels me to stop at the portal, unless I can find some authority in the judgments of this court, to which I may surrender my own.

Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government. 8 Wheaton, 592. In Fletcher *vs.* Peck, this court decided that the Indian occupancy was not absolutely repugnant to a seisin in fee in Georgia, that she had good right to grant land so occupied, that it was within the state, and could be held by purchasers under a law subject only to extinguishment of the Indian title. 6 Cranch, 88, 142. 9 Cranch, 11. In the case of Johnson *vs.* McIntosh, 8 Wheaton, 543, 571, the nature of the Indian title to lands on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the

states, the confederacy and this Union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

By the treaty of peace the powers of government and the rights of soil which had previously been in Great Britain, passed definitively to these states. 8 Wheat. 584. They asserted these rights, and ceded soil and jurisdiction to the United States. The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society. They are not named or referred to in any part of the opinion of the court as nations or states, and no where declared to have any national
*49 capacity or attributes of sovereignty in their * relations to the general or state governments. The principles established in this case have been supposed to apply to the rights which the nations of Europe claimed to acquire by discovery, as only relative between themselves, and that they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians. But the language of the court is too explicit to be misunderstood. "This principle was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Those relations which were to subsist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian rights of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. 8 Wheat. 574.

I feel it my duty to apply them to this case. They are in perfect accordance with those on which the governments of the united and individual states have acted in all their changes; they were asserted and maintained by the colonies, before they assumed independence. While dependent themselves on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state within the limits of a state. If their jurisdiction within their boundaries has been unquestioned until this controversy; if rights have been exercised which are directly repugnant to those now claimed; the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by
*50 * mere judicial power, upon the other departments of this government and the states of this Union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. It will be a declaration, in my deliberate

judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government; denied by all through all time; unclaimed till now; and now declared to have been called into exercise, not by any change in our constitution, the laws of the Union or the states; but pre-existent and paramount over the supreme law of the land.

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme; so plain to my judgment and reason. Those, who have brought public opinion to bear on this subject, act under a mere moral responsibility; under no oath which binds their movements to the straight and narrow line drawn by the constitution. Politics or philanthropy may impel them to pass it, but when their objects can be effectuated only by this court, they must not expect its members to diverge from it, when they cannot conscientiously take the first step without breaking all the high obligations under which they administer the judicial power of the constitution. The account of my executorship cannot be settled before the court of public opinion, or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.

Mr. Justice THOMPSON, Dissenting.—Entertaining different views of the questions now before us in this case, and having arrived at a conclusion different from that of a majority of the court, and considering the importance of the case and the constitutional principle involved in it; I shall proceed, with all due respect for the opinion of others, to assign the reasons upon which my own has been formed.

*51 In the opinion pronounced by the court, the merits of the * controversy between the state of Georgia and the Cherokee Indians have not been taken into consideration. The denial of the application for an injunction has been placed solely on the ground of want of jurisdiction in this court to grant the relief prayed for. It became, therefore, unnecessary to inquire into the merits of the case. But thinking as I do that the court has jurisdiction of the case, and may grant relief, at least in part; it may become necessary for me, in the course of my opinion, to glance at the merits of the controversy; which I shall, however, do very briefly, as it is important so far as relates to the present application.

Before entering upon the examination of the particular points which have been made and argued, and for the purpose of guarding against any erroneous conclusions, it is proper that I should state, that I do not claim for this court, the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed by the bill may be beyond the reach of this court. Much of the matter therein contained, by way of complaint, would seem to depend for relief upon the exercise of political power; and as such, appropriately devolving upon the executive, and not the judicial department of the government. This court can grant relief so far only as the rights of person or property are drawn in question, and have been infringed.

It would very ill become the judicial station which I hold, to indulge in any remarks upon the hardship of the case, or the great injustice that would seem

to have been done to the complainants, according to the statement in the bill, and which for the purpose of the present motion I must assume to be true. If they are entitled to other than judicial relief, it cannot be admitted that in a government like ours, redress is not to be had in some of its departments; and the responsibility for its denial must rest upon those who have the power to grant it. But believing as I do, that relief to some extent falls properly under judicial cognizance, I shall proceed to the examination of the case under the following heads.

1. Is the Cherokee nation of Indians a competent party to sue in this court?

*52 * 2. Is a sufficient case made out in the bill, to warrant this court in granting any relief?

3. Is an injunction the fit and appropriate relief?

1. By the constitution of the United States it is declared (Art. 3, § 2), that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority; &c. to controversies between two or more states, &c. and between a state or the citizens thereof; and foreign states, citizens or subjects. The controversy in the present case is alleged to be between a foreign state, and one of the states of the Union; and does not, therefore, come within the 11th amendment of the constitution, which declares that the judicial power of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment does not, therefore, extend to suits prosecuted against one of the United States by a foreign state. The constitution further provides, that in all cases where a state shall be a party, the supreme court shall have original jurisdiction. Under these provisions in the constitution, the complainants have filed their bill in this court, in the character of a foreign state, against the state of Georgia; praying an injunction to restrain that state from committing various alleged violations of the property of the nation, claimed under the laws of the United States, and treaties made with the Cherokee nation.

That a state of this Union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt; and the first inquiry is, whether the Cherokee nation is a foreign state within the sense and meaning of the constitution.

The terms *state* and *nation* are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union.

*53 Such a society has its affairs and interests to manage; deliberates, and takes resolutions in common, and thus becomes a moral * person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations.

It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion, that they form a sovereign state. They have always been dealt with as such by the government of the United States; both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sover-
*54 eignty and self government over what remained unsold. * And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state, according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.

Whether the Cherokee Indians are to be considered a foreign state or not, is a point on which we cannot expect to discover much light from the law of nations. We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it.

That numerous tribes of Indians, and among others the Cherokee nation, occupied many parts of this country, long before the discovery by Europeans, is abundantly established by history; and it is not denied, but that the Cherokee nation occupied the territory now claimed by them, long before that period. It does not fall within the scope and object of the present inquiry, to go into a critical examination of the nature and extent of the rights growing out of such occupancy, or the justice and humanity with which the Indians have been treated, or their rights respected.

That they are entitled to such occupancy, so long as they choose quietly and peaceably to remain upon the land, cannot be questioned. The circumstance of their original occupancy is here referred to, merely for the purpose of showing, that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations, to all the world; not having any connexion, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of
*55 peace, containing stipulations on each side according * to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognise the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection, so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession.

In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their *foreign* character, and in that sense must the term *foreign* be understood as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United States. It is the political relation in which one government or country stands to another, which constitutes it foreign to the other. The Cherokee territory being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived that any absurdity or inconsistency grows out of the circumstance, that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed; but it does not at all affect the political relation between Georgia and those
*56 Indians. Suppose the * Cherokee territory had been occupied by Spaniards or any other civilized people, instead of Indians, and they had, from time to time ceded to the United States portions of their lands precisely in the same manner as the Indians have done, and in like manner retained and occupied the part now held by the Cherokees, and having a regular government established there: would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States? If we look to lexicographers, as well as approved writers, for the use of the term *foreign,* it may be applied with the strictest propriety to the Cherokee nation.

In a general sense it is applied to any person or thing belonging to another nation or country. We call an alien a foreigner because he is not of the country in which we reside. In a political sense we call every country foreign, which is not within the jurisdiction of the same government. In this sense, Scotland

before the Union, was foreign to England; and Canada and Mexico foreign to the United States. In the United States all transatlantic countries are foreign to us. But this is not the only sense in which it is used.

It is applied with equal propriety to an adjacent territory, as to one more remote. Canada or Mexico is as much foreign to us as England or Spain. And it may be laid down as a general rule, that when used in relation to countries in a political sense, it refers to the jurisdiction or government of the country. In a commercial sense, we call all goods coming from any country not within our own jurisdiction foreign goods.

In the diplomatic use of the term, we call every minister a foreign minister, who comes from another jurisdiction or government. And this is the sense in which it is judicially used by this court, even as between the different states of this Union. In the case of Buckner *vs.* Finlay, 2 Peters, 590, it was held that a bill of exchange drawn in one state of the Union, on a person living in another state, was a foreign bill, and to be treated as such in the courts of the United States. The court says, that in applying the definition of a foreign bill, to the political character of the several states of this Union, in relation to each
*57 other, we are all clearly of opinion, * that bills drawn in one of these states upon persons living in another of them, partake of the character of foreign bills, and ought to be so treated. That for all national purposes embraced by the federal constitution, the states and the citizens thereof are one; united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of, each other; their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. So in the case of Warder *vs.* Arrell, decided in the court of appeals of Virginia, 2 Wash. 298. The court, in speaking of foreign contracts, and saying that the laws of the foreign country where the contract was made must govern, add; the same principle applies, though with no greater force, to the different states of America: for though they form a confederated government, yet the several states retain their individual sovereignty; and, with respect to their municipal regulations, are to each other foreign.

It is manifest from these cases, that a foreign state, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its territorial position. This is the marked distinction, particularly in the case of Buckner *vs.* Finlay. So far as these states are subject to the laws of the Union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not; I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered. It is governed by its own laws, usages and customs: it has no connexion with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations. And this seems to be the view taken of them by Mr. Justice Johnson in the case of Fletcher *vs.* Peck, 6 Cranch, 146; 2 Peters's Condens. Rep. 308.

In speaking of the state and condition of the different Indian nations, he observes, "that some have totally extinquished their national fire, and submitted

themselves to the laws of the states; others have by treaty acknowledged
*58 that they hold * their national existence at the will of the state, within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia, among which are the Cherokees. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people: and the uniform practice of acknowledging their right of soil by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their rights of soil."

Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state. But no doubt can be entertained that such an action might be sustained upon a proper case being presented. It is expressly provided for in the constitution; and this provision is certainly not to be rejected as entirely nugatory.

Suppose a state, with the consent of congress, should enter into an agreement with a foreign power (as might undoubtedly be done, Constitution, Art. 1. § 10) for a loan of money; would not an action be sustained in this court to enforce payment thereof? Or suppose the state of Georgia, with the consent of congress, should purchase the right of the Cherokee Indians to this territory, and enter into a contract for the payment of the purchase money; could there be a doubt that an action could be sustained upon such a contract? No objection would certainly be made for want of competency in that nation to make a valid contract. The numerous treaties entered into with the nation would be a conclusive answer to any such objection. And if an action could be sustained in such case, it must be under that provision in the constitution which gives jurisdiction to this court in controversies between a state and a foreign state. For the Cherokee nation is certainly not one of the United States.

And what possible objection can lie to the right of the complainants to sustain an action? The treaties made with this nation purport to secure to it certain rights. These are not gratuituous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the
*59 * Indians by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract. And where the right secured by such a treaty forms a proper subject for judicial cognizance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States upon such treaty, because no possible case can exist where the United States can be sued. But not so with respect to a state: and if any right secured by treaty has been violated by a state, in a case proper for judicial inquiry, no good reason is perceived why an action may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorised to enforce all rights that may be recognized and secured by treaty. In many instances, these are mere political rights with which

the judiciary cannot deal. But when the question relates to a mere right of property, and a proper case can be made between competent parties; it forms a proper subject for judicial inquiry.

It is a rule which has been repeatedly sanctioned by this court, that the judicial department is to consider as sovereign and independent states or nations, those powers, that are recognized as such by the executive and legislative departments of the government; they being more particularly intrusted with our foreign relations. 4 Cranch, 241, 2 Peters's Cond. Rep. 98; 3 Wheat. 634; 4 Wheat. 64.

If we look to the whole course of treatment by this country of the Indians, from the year 1775, to the present day, when dealing with them in their aggregate capacity as nations or tribes, and regarding the mode and manner in which all negotiations have been carried on and concluded with them; the conclusion appears to me irresistible, that they have been regarded, by the executive and legislative branches of the government, not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the states within which they were located. This remark is to be

*60 * understood, of course, as referring only to such as live together as a distinct community, under their own laws, usages and customs; and not to be mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country: their national character extinguished; and their usages and customs in a great measure abandoned; self-government surrendered; and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated.

Such, however, is not the case with the Cherokee nation. It retains its usages and customs and self government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them. All negotiations carried on with the Cherokees and other Indian nations have been by way of treaty with all the formality attending the making of treaties with any foreign power. The journals of congress, from the year 1775, down to the adoption of the present constitution, abundantly establish this fact. And since that period such negotiations have been carried on by the treaty-making power, and uniformly under the denomination of treaties.

What is a treaty as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power? They relate to peace and war; the surrender of prisoners; the cession of territory; and the various subjects which are usually embraced in such contracts between sovereign nations.

A recurrence to the various treaties made with the Indian nations and tribes in different parts of the country, will fully illustrate this view of the relation in which our government has considered the Indians as standing. It will be sufficient however, to notice a few of the many treaties made with this Cherokee nation.

*61 By the treaty of Hopewell of the 28th November 1785, * 1 Laws

U. S. 322, mutual stipulations are entered into, to restore all prisoners taken by either party, and the Cherokees stipulate to restore all negroes, and all other property taken from the citizens of the United States; and a boundary line is settled between the Cherokees, and the citizens of the United States, and this embraced territory within the chartered limits of Georgia. And by the sixth article it is provided, that if any Indian, or person residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime on any citizen of the United States, or person under their protection, the nation or tribe to which such offender may belong shall deliver him up to be punished according to the ordinances of the United States. What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgment, that this territory was under a foreign jurisdiction. If it had been understood, that the jurisdiction of the state of Georgia extended over this territory, no such stipulation would have been necessary. The process of the courts of Georgia would have run into this as well as into any other part of the state. It is a stipulation analogous to that contained in the treaty of 1794 with England, 1 Laws U. S. 220, by the twenty-seventh article of which it is mutually agreed, that each party will deliver up to justice all persons, who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other. Upon what ground can any distinction be made, as to the reason and necessity of such stipulation, in the respective treaties? The necessity for the stipulation in both cases must be, because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been shown, is what makes governments and nations foreign to each other in their political relations.

The same stipulation, as to delivering up criminals who shall take refuge in the Cherokee nation, is contained in the treaty of Holston of the 2d of July 1791, 1 Laws U. S. 327. And the eleventh article fully recognizes the jurisdiction of the Cherokee nation over the territory occupied by them. It provides,
*62 that if any citizen of the United States shall go into * the territory belonging to the Cherokees, and commit any crime upon, or trespass against the person, or property of any friendly Indian, which, if committed within the jurisdiction of any state, would be punishable by the laws of such state, shall be subject to the same punishment, and proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state. Here is an explicit admission that the Cherokee territory is not within the jurisdiction of any state. If it had been considered within the jurisdiction of Georgia, such a provision would not only be unnecessary but absurd. It is a provision looking to the punishment of a citizen of the United States for some act done in a foreign country. If exercising exclusive jurisdiction over a country is sufficient to constitute the state or power so exercising it a foreign state, the Cherokee nation may assuredly with the greatest propriety be so considered.

The phraseology of the clause in the constitution, giving to congress the power to regulate commerce, is supposed to afford an argument against considering the Cherokees a foreign nation. The clause reads thus, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution, Art. 1, § 8. The argument is, that if the Indian

tribes are foreign nations, they would have been included without being specially named, and being so named imports something different from the previous term "foreign nations."

This appears to me to partake too much of a mere verbal criticism, to draw after it the important conclusion that Indian tribes are not foreign nations. But the clause affords, irresistibly, the conclusion, that the Indian tribes are not there understood as included within the description of the "several states;" or there could have been no fitness in immediately thereafter particularizing "the Indian tribes."

It is generally understood that every separate body of Indians is divided into bands or tribes, and forms a little community within the nation to which it belongs; and as the nation has some particular symbol by which it is distinguished from others, so each tribe has a badge from which it is denominated, and each tribe may have rights applicable to itself.

*63 Cases may arise where the trade with a particular tribe may * require to be regulated, and which might not have been embraced under the general description of the term *nation,* or it might at least have left the case somewhat doubtful; as the clause was intended to vest in congress the power to regulate all commercial intercourse, this phraseology was probably adopted to meet all possible cases; and the provision would have been imperfect, if the term *Indian tribes* had been omitted.

Congress could not then have regulated the trade with any particular tribe that did not extend to the whole nation. Or, it may be, that the term *tribe* is here used as importing the same thing as that of *nation,* and adopted merely to avoid the repetition of the term *nation:* and the Indians are specially named, because there was a provision somewhat analogous in the confederation; and entirely omitting to name the Indian tribes, might have afforded some plausible grounds for concluding that this branch of commercial intercourse was not subject to the power of congress.

On examining the journals of the old congress, which contain numerous proceedings and resolutions respecting the Indians, the terms "nation" and "tribe" are frequently used indiscriminately, and as importing the same thing; and treaties were sometimes entered into with the Indians, under the description of denomination of tribes, without naming the nation. See Journals 30th June and 12th July 1775; 8th March 1776; 20th October 1777: and numerous other instances.

But whether any of these suggestions will satisfactorily account for the phraseology here used or not, it appears to me to be of too doubtful import to outweigh the considerations to which I have referred to show that the Cherokees are a foreign nation. The difference between the provision in the constitution and that in the confederation on this subject appears to me to show very satisfactorily, that so far as related to trade and commerce with the Indians wherever found in tribes, whether within or without the limits of a state, was subject to the regulation of congress.

The provision in the confederation, Art. 9, 1 Laws United States, 17, is, that congress shall have the power of regulating the trade and management of all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or vio-

*64 lated. * The true import of this provision is certainly not very obvious; see Federalist, No. 42. What were the legislative rights intended to be embraced within the proviso is left in great uncertainty. But whatever difficulty on that subject might have arisen under the confederation, it is entirely removed by the omission of the proviso in the present constitution; thereby leaving this power entirely with congress, without regard to any state right on the subject; and showing that the Indian tribes were considered as distinct communities although within the limits of a state.

The provision, as contained in the confederation, may aid in illustrating what is to be inferred from some parts of the constitution, Art. 1, § 1, par. 3, as to the apportionment of representatives, and acts of congress in relation to the Indians, to wit, that they are divided into two distinct classes. One composed of those who are considered members of the state within which they reside, and the other not: the former embracing the remnant of the tribes who had lost their distinctive character as a separate community, and had become subject to the laws of the states; and the latter such as still retained their original connexion as tribes, and live together under their own laws, usages and customs, and, as such, are treated as a community independent of the state. No very important conclusion I think, therefore, can be drawn from the use of the term "tribe" in this clause of the constitution; intended merely for commercial regulations. If considered as importing the same thing as the term "nation," it might have been adopted to avoid the repetition of the word *nation.*

Other instances occur in the constitution where different terms are used, importing the same thing. Thus, in the clause giving jurisdiction to this court, the term "foreign states" is used instead of "foreign nations," as in the clause relating to commerce. And again, in Art. 1, § 10, a still different phraseology is employed. "No state, without the consent of congress shall enter into any agreement or compact with a 'foreign power.'" But each of these terms, nation, state, power, as used in different parts of the constitution, imports the same thing, and does not admit of a different interpretation. In the treaties made with the Indians, they are sometimes designated under the name of *tribe,* and *65 sometimes that * of *nation.* In the treaty of 1804 with the Delaware Indians, they are denominated the "Delaware tribe of Indians." 1 Laws United States, 305. And in a previous treaty with the same people in the year 1778, they are designated by the name of "the Delaware nation." 1 Laws United States, 302.

As this was one of the earliest treaties made with the Indians, its provisions may serve to show in what light the Indian nations were viewed by congress at that day.

The territory of the Delaware nation was within the limits of the states of New York, Pennsylvania and New Jersey. Yet we hear of no claim of jurisdiction set up by those states over these Indians. This treaty, both in form and substance purports to be an arrangement with an independent sovereign power. It even purports to be articles of confederation. It contains stipulations relative to peace and war, and for permission to the United States troops to pass through the country of the Delaware nation. That neither party shall protect in their respective states, servants, slaves, or criminals, fugitives from the other; but secure, and deliver them up. Trade is regulated between the

parties. And the sixth article shows the early pledge of the United States to protect the Indians in their possessions, against any claims or encroachments of the states. It recites, that whereas the enemies of the United States have endeavoured to impress the Indians in general with an opinion that it is the design of the states to extirpate the Indians, and take possession of their country, to obviate such false suggestions; the United States do engage to guaranty to the aforesaid nation of Delawares and their heirs, all their territorial rights, in the fullest and most ample manner, as it has been bounded by former treaties, &c. And provision is even made for inviting other tribes to join the confederacy; and to form a state; and have a representation in congress; should it be found conducive to the mutual interest of both parties. All which provisions are totally inconsistent with the idea of these Indians being considered under the jurisdiction of the states; although their chartered limits might extend over them.

The recital, in this treaty, contains a declaration and admission of congress of the rights of Indians in general; and that the impression which our
*66 enemies were endeavouring * to make, that it was the design of the states to extirpate them and take their lands, was false. And the same recognition of their rights runs through all the treaties made with the Indian nations or tribes, from that day down to the present time.

The twelfth article of the treaty of Hopewell contains a full recognition of the sovereign and independent character of the Cherokee nation. To impress upon them full confidence in the justice of the United States respecting their interest, they have a right to send a deputy of their choice to congress. No one can suppose that such deputy was to take his seat as a member of congress; but that he would be received as the agent of that nation. It is immaterial what such agent is called, whether minister, commissioner or deputy; he is to represent his principal.

There could have been no fitness or propriety in any such stipulation, if the Cherokee nation had been considered in any way incorporated with the state of Georgia, or as citizens of that State. The idea of the Cherokees being considered citizens is entirely inconsistent with several of our treaties with them. By the eighth article of the treaty of the 26th December 1817, 6 Laws U. S. 706, the United States stipulate to give 640 acres of land to each head of any Indian family residing on the lands now ceded, or which may hereafter be surrendered to the United States, who may wish to become citizens of the United States; so also the second article of the treaty with the same nation, of the 10th of March 1819, contains the same stipulation in favour of the heads of families, who may choose to become citizens of the United States; thereby clearly showing that they were not considered citizens at the time those stipulations were entered into, or the provision would have been entirely unnecessary if not absurd. And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. And it was, therefore, very aptly asked, on the argument, and I think not very easily answered, how a nation composed of aliens or foreigners can be other than a foreign nation.

The question touching the citizenship of an Oneida Indian came
*67 under the consideration of the supreme court of New * York in the case of Jackson *vs.* Goodel, 20 Johns. 193. The lessor of the plaintiff was the

son of an Oneida Indian who had received a patent for the lands in question, as an officer in the revolutionary war; and although the supreme court, under the circumstances of the case, decided he was a citizen, yet Chief Justice Spencer observed; we do not mean to say that the condition of the Indian tribes (alluding to the Six Nations), at former and remote periods, has been that of subjects or citizens of the state; their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon and subject to our government. But the cause being carried up to the court of errors, Chancellor Kent, in a very elaborate and able opinion on that question, came to a different conclusion as to the citizenship of the Indian, even under the strong circumstances of that case.

"The Oneidas," he observed, and "the tribes composing the Six Nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people and become completely incorporated with us, to point out the time when that event took place. In my view they have never been regarded as citizens, or members of our body politic. They have always been, and still are, considered by our laws as dependent tribes, governed by their own usages and chiefs; but placed under our protection, and subject to our coercion so far as the public safety required it, and no farther. The whites have been gradually pressing upon them, as they kept receding from the approaches of civilization. We have purchased the greater part of their lands, destroyed their hunting grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes. Through the whole course of our colonial history, these Indians were considered dependent allies. The colonial authorities uniformly negotiated with them, and made and observed treaties with them as sovereign communities exercising the right of free deliberation
*68 and action; but, in consideration of protection, owing * a qualified subjection in a national capacity, to the British crown. No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown: such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. Vat. B. 1, ch. 16, § 194. The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. There is nothing in the proceedings of the United States during the revolutionary war, which went to impair and much less to extinguish the national character of the Six Nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations; but placed in the same state of dependence, and calling for the same protection which existed before the war. In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states; and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty?"

If this be a just view of the Oneida Indians, the rules and principles here applied to that nation may with much greater force be applied to the character,

state, and condition of the Cherokee nation of Indians; and we may safely conclude that they are not citizens, and must of course be aliens: and, if aliens in their individual capacities, it will be difficult to escape the conclusion, that as a community, they constitute a foreign nation or state, and thereby become a competent party to maintain an action in this court, according to the express terms of the constitution.

And why should this court scruple to consider this nation a competent party to appear here?

Other departments of the government, whose right it is to decide what powers shall be recognized as sovereign and independent nations, have treated this nation as such. They have considered it competent, in its political and national capacity, to enter into contracts of the most solemn character;
*69 and if these contracts contain matter proper for judicial inquiry, * why should we refuse to entertain jurisdiction of the case? Such jurisdiction is expressly given to this court in cases arising under treaties. If the executive department does not think proper to enter into treaties or contracts with the Indian nations, no case with them can arise calling for judicial cognizance. But when such treaties are found containing stipulations proper for judicial cognizance, I am unable to discover any reasons satisfying my mind that this court has not jurisdiction of the case.

The next inquiry is, whether such a case is made out in the bill as to warrant this court in granting any relief?

I have endeavoured to show that the Cherokee nation is a foreign state; and, as such, a competent party to maintain an original suit in this court against one of the United States. The injuries complained of are violations committed and threatened upon the property of the complainants, secured to them by the laws and treaties of the United States. Under the constitution, the judicial power of the United States extends expressly to all cases in law and equity, arising under the laws of the United States, and treaties made or which shall be made, under the authority of the same.

In the case of Osborn *vs.* United States Bank, 9 Wheat. 819, the court say, that this clause in the constitution enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form presented by law. It then becomes a case, and the constitution authorises the application of the judicial power.

The question presented in the present case is, under the ordinary form of judicial proceedings, to obtain an injunction to prevent or stay a violation of the rights of property claimed and held by the complainants, under the treaties and laws of the United States; which, it is alleged, have been violated by the state of Georgia. Both the form and the subject matter of the complaint, therefore, fall properly under judicial cognizance.

*70 What the rights of property in the Cherokee nation are, * may be discovered from the several treaties which have been made between the United States and that nation between the years 1785 and 1819. It will be unnecessary to notice many of them. They all recognize, in the most unqualified

manner, a right of property in this nation, to the occupancy at least, of the lands in question. It is immaterial whether this interest is a mere right of occupancy, or an absolute right of the soil. The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of which they are entitled to protection, according to the doctrine of this court in the cases of Fletcher *vs.* Peck, 6 Cranch 87, 2 Peters's Cond. Rep. 308, and Johnson *vs.* M'Intosh, 8 Wheat. 592. By the fourth article of the treaty of Hopewell, as early as the year 1785, 1 Laws United States, 323, the boundary line between the Cherokees and the citizens of the United States within the limits of the United States is fixed.

The fifth article provides for the removal and punishment of citizens of the United States or other persons, not being Indians, who shall attempt to settle on the lands so allotted to the Indians; thereby not only surrendering the exclusive possession of these lands to this nation, but providing for the protection and enjoyment of such possession. And, it may be remarked, in corroboration of what has been said in a former part of this opinion, that there is here drawn a marked line of distinction between the Indians and citizens of the United States; entirely excluding the former from the character of citizens.

Again, by the treaty of Holston in 1791, 1 Laws United States, 325, the United States purchase a part of the territory of this nation, and a new boundary line is designated, and provision made for having it ascertained and marked. The mere act of purchasing and paying a consideration for these lands is a recognition of the Indian right. In addition to which, the United States, by the seventh article, solemnly guaranty to the Cherokee nation all their lands not ceded by that treaty. And by the eighth article it is declared, that any citizens of the United States, who shall settle upon any of the Cherokee lands, shall forfeit the protection of the United States; and the Cherokees may punish them or not as they shall please.

*71 * This treaty was made soon after the adoption of the present constitution. And in the last article it is declared that it shall take effect, and be obligatory upon the contracting parties as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate; thereby showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations; and which has been the mode of negotiating in all subsequent Indian treaties.

And this course was adopted by President Washington upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states, that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power entrusted to him by the constitution to carry that treaty into faithful execution; unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlements, and compensating the Cherokees therefor. And he put to the senate this question: shall the United States stipulate solemnly to guarantee the new boundary which shall be arranged? Upon which the senate resolve, that in case a new, or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the

Cherokee Indians, the senate do advise and consent solemnly to guaranty the same. 1 Executive Journal, 60. In consequence of which the treaty of Holston was entered into, containing the guarantee.

Further cessions of land have been made at different times, by the Cherokee nation to the United States, for a consideration paid therefor; and, as the treaties declare, in acknowledgment for the protection of the United States (see treaty of 1798, 1 Laws U. S. 332), the United States always recognizing, in the fullest manner, the Indian right of possession: and in the treaty of the 8th of July 1817, art. 5 (6 Laws U. S. 702), all former treaties are declared to be in full force; and the sanction of the United States is given to the proposition of a portion of the nation to begin the establishment of fixed laws and a regular government: thereby recognizing in the nation a political existence, capable of
*72 forming an independent * government, separate and distinct from and in no manner whatever under the jurisdiction of the State of Georgia; and no objection is known to have been made by that state.

And, again, in 1819 (6 Laws U. S. 748) another treaty is made sanctioning and carrying into effect the measures contemplated by the treaty of 1817; beginning with a recital that the greater part of the Cherokees have expressed an earnest desire to remain on this side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, of the 8th of July 1817, might without further delay be finally adjusted, have offered to make a further cession of land, &c. This cession is accepted, and various stipulations entered into, with a view to their civilization, and the establishment of a regular government, which has since been accomplished. And by the fifth article it is stipulated that all white people who have intruded, or who shall thereafter intrude on the lands reserved for the Cherokees, shall be removed by the United States, and proceeded against according to the provisions of the act of 1802, entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 3 Laws U. S. 460. By this act the boundary lines, established by treaty with the various Indian tribes, are required to be ascertained and marked; and among others, that with the Cherokee nation, according to the treaty of the 2d of October 1798.

It may be necessary here briefly to notice some of the provisions of this act of 1802, so far as it goes to protect the rights of property in the Indians; for the purpose of seeing whether there has been any violation of those rights by the state of Georgia, which falls properly under judicial cognizance. By this act it is made an offence punishable by fine and imprisonment, for any citizen or other person resident in the United States, or either of the territorial districts, to cross over or go within the boundary line, to hunt or destroy the game, or drive stock to range or feed on the Indian lands, or to go into any country allotted to the Indians, without a passport, or to commit therein any robbery, larceny, trespass, or other crime, against the person or property of any
*73 friendly * Indian, which would be punishable, if committed within the jurisdiction of any state against a citizen of the United States; thereby necessarily implying that the Indian territory secured by treaty was not within the jurisdiction of any state. The act further provides, that when property is taken or destroyed, the offender shall forfeit and pay twice the value of the

property so taken or destroyed. And by the fifth section it is declared, that if any citizen of the United States, or other person, shall make a settlement on any lands belonging or secured, or guarantied, by treaty with the United States to any Indian tribe; or shall survey or attempt to survey, such lands, or designate any of the boundaries, by marking trees or otherwise; such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months.

This act contains various other provisions for the purpose of protecting the Indians in the free and uninterrupted enjoyment of their lands: and authority is given (§ 16) to employ the military force of the United States to apprehend all persons who shall be found, in the Indian country, in violation of any of the provisions of the act; and deliver them up to the civil authority, to be proceeded against in due course of law.

It may not be improper here to notice some diversity of opinion that has been entertained with respect to the construction of the 19th section of this act, which declares that nothing therein contained shall be construed to prevent any trade or intercourse with the Indians living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual states. It is understood that the state of Georgia contends that the Cherokee nation come within this section, and are subject to the jurisdiction of that state. Such a construction makes the act inconsistent with itself, and directly repugnant to the various treaties entered into between the United States and the Cherokee Indians. The act recognizes and adopts the boundary line as settled by treaty. And by these treaties, which are in full force, the United States solemnly guaranty to the Cherokee nation all their lands, not ceded to the United States; and these lands lie within the chartered
*74 limits of Georgia: and this was a subsisting guarantee under the * treaty of 1791, when the act of 1802 was passed. It would require the most unequivocal language to authorise a construction so directly repugnant to these treaties.

But this section admits of a plain and obvious interpretation, consistent with other parts of the act, and in harmony with these treaties. The reference undoubtedly is to that class of Indians which has already been referred to, consisting of the mere remnants of tribes, which have become almost extinct; and who have, in a great measure, lost their original character, and abandoned their usages and customs, and become subjects to the laws of the state, although in many parts of the country living together, and surrounded by the whites. They cannot be said to have any distinct government of their own, and are within the ordinary jurisdiction and government of the state where they are located.

But such was not the condition and character of the Cherokee nation, in any respect whatever, in the year 1802, nor at any time since. It was a numerous and distinct nation, living under the government of their own laws, usages, and customs, and in no sense under the ordinary jurisdiction of the state of Georgia; but under the protection of the United States, with a solemn guarantee by treaty of the exclusive right to the possession of their lands. This guarantee is to the Cherokees in their national capacity. Their land is held in common, and every invasion of their possessory right is an injury done to the nation, and not to any individual. No private or individual suit could be sus-

tained: the injury done being to the nation, the remedy sought must be in the name of the nation. All the rights secured to these Indians, under any treaties made with them, remain unimpaired. These treaties are acknowledged by the United States to be in full force, by the proviso to the seventh section of the act of the 28th May 1830; which declares, that nothing in this act contained shall be construed as authorising or directing the violation of any existing treaty between the United States and any Indian tribes.

That the Cherokee nation of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question, and that the United States are bound under their guarantee, to protect the nation in the enjoyment *75 of such occupancy; * cannot, in my judgment, admit of a doubt: and that some of the laws of Georgia set out in the bill are in violation of, and in conflict with those treaties and the act of 1802, is to my mind equally clear. But a majority of the court having refused the injunction, so that no relief whatever can be granted, it would be a fruitless inquiry for me to go at large into an examination of the extent to which relief might be granted by this court, according to my own view of the case.

I, certainly, as before observed, do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character. Although the whole of these laws may be in violation of the treaties made with this nation, it is probable this court cannot grant relief to the full extent of the complaint. Some of them, however, are so directly at variance with these treaties and the laws of the United States touching the rights of property secured to them, that I can perceive no objection to the application of judicial relief. The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed in any manner whatever as acts of war; but merely as an assertion of what is claimed as a legal right: and in this light ought they to be considered by this court.

The act of the 2d of December, 1830 is entitled "an act to authorize the governor to take possession of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called *76 the Cherokee country, * and those upon all other unappropriated lands of the state, and for punishing persons who may be found trespassing on the mines." The preamble to this act asserts the title to these mines to belong to the state of Georgia; and by its provisions twenty thousand dollars are appropriated, and placed at the disposal of the governor to enable him to take possession of those mines; and it is made a crime, punishable by imprisonment in the peni-

tentiary of Georgia at hard labour, for the Cherokee Indians to work these mines. And the bill alleges that under the laws of the state in relation to the mines, the governor has stationed at the mines an armed force who are employed in restraining the complainants in their rights and liberties in regard to their own mines, and in enforcing the laws of Georgia upon them. These can be considered in no other light than as acts of trespass; and may be treated as acts of the State; and not of the individuals employed as the agents. Whoever authorises or commands an act to be done may be considered a principal, and held responsible, if he can be made a party to a suit: as the state of Georgia may undoubtedly be. It is not perceived, on what ground the state can claim a right to the possession and use of these mines. The right of occupancy is secured to the Cherokees by treaty, and the state has not even a reversionary interest in the soil. It is true, that by the compact with Georgia of 1802, the United States have stipulated to extinguish, for the use of the state, the Indian title to the lands within her remaining limits, "as soon as it can be done, peaceably and upon reasonable terms." But until this is done, the state can have no claim to the lands.

The very compact is a recognition by the state of a subsisting Indian right: and which may never be extinguished. The United States have not stipulated to extinguish it, until it can be done "peaceably and upon reasonable terms;" and whatever complaints the state of Georgia may have against the United States for the non-fulfilment of this compact, it cannot affect the right of the Cherokees. They have not stipulated to part with that right; and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of the territory.

*77 Again, by the act of the 21st December 1830, surveyors * are authorized to be appointed to enter upon the Cherokee territory and lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia; reserving to the Indians only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and even excepting from such reservation improvements recently made near the gold mines.

This is not only repugnant to the treaties with the Cherokees, but directly in violation of the act of congress of 1802; the fifth section of which makes it an offence punishable with fine and imprisonment, to survey or attempt to survey or designate any of the boundaries, by marking trees or otherwise, of any land belonging to or secured by treaty to any Indian tribe: in the face of which, the law of Georgia authorises the entry upon, taking possession of, and surveying, and distributing by lottery, these lands guarantied by treaty to the Cherokee nation; and even gives authority to the governor to call out the military force, to protect the surveyors in the discharge of the duty assigned them.

These instances are sufficient to show a direct, and palpable infringement of the rights of property secured to the complainants by treaty, and in violation of the act of congress of 1802. These treaties and this law, are declared by the constitution to be the supreme law of the land; it follows, as matter of course, that the laws of Georgia, so far as they are repugnant to them, must be void and inoperative. And it remains only very briefly to inquire whether the

execution of them can be restrained by injunction according to the doctrine and practice of courts of equity.

According to the view which I have already taken of the case, I must consider the question of right as settled in favour of the complainants. This right rests upon the laws of the United States, and treaties made with the Cherokee nation. The construction of these laws and treaties are pure questions of law, and for the decision of the court. There are no grounds, therefore, upon which it can be necessary to send the cause for a trial at law of the right, before awarding an injunction: and the simple question is, whether such a case is made out by the bill, as to authorize the granting an injunction?

*78 * This is a prohibitory writ, to restrain a party from doing a wrong or injury to the rights of another. It is a beneficial process, for the protection of rights; and is favourably viewed by courts of chancery, as its object is to prevent rather than redress injuries; and has latterly been more liberally awarded than formerly. 7 Ves. Jun. 307.

The bill contains charges of numerous trespasses by entering upon the lands of the complainants and doing acts greatly to their injury and prejudice, and to the disturbance of the quiet enjoyment of their land, and threatening a total destruction of all their rights. And although it is not according to the course of chancery, to grant injunctions to prevent trespasses when there is a clear and adequate remedy at law, yet it will be done when the case is special and peculiar, and when no adequate remedy can be had at law and particularly when the injury threatens irreparable ruin. 6 Ves. 147. 7 Eden, 307. Every man is entitled to be protected in the possession and enjoyment of his property; and the ordinary remedy by action of trespass may generally be sufficient to afford such protection. But, where from the peculiar nature and circumstances of the case, this is not an adequate protection, it is a fit case to interpose the preventive process of injunction. This is the principle running through all the cases on this subject, and is founded upon the most wise and just considerations; and this is peculiarly such a case. The complaint is not of a mere private trespass, admitting of compensation in damages; but of injuries which go to the total destruction of the whole right of the complainants. The mischief threatened is great and irreparable. 7 Johns. Cha. 330. It is one of the most beneficial powers of a court of equity to interpose and prevent an injury, before any has actually been suffered; and this is done by a bill, which is sometimes called a bill quia timet. Mitford, 120.

The doctrine of this court in the case of Osborne *vs.* United States Bank, 9 Wheat. 338, fully sustains the present application for an injunction. The bill in that case was filed to obtain an injunction against the auditor of the state of Ohio, to restrain him from executing a law of that state, which was alleged to be to the great injury of the bank, and to the destruction of rights

*79 conferred by their charter. The only * question of doubt entertained by the court in that case was, as to issuing an injunction against an officer of the state to restrain him from doing an official act enjoined by statute, the state not being made a party. But even this was not deemed sufficient to deny the injunction; the court considered that the Ohio law was made for the avowed purpose of expelling the bank from the state, and depriving it of its chartered privileges: and they say, if the state could have been made a party defendant, it would scarcely be denied, that it would be a strong case for an injunction; that

the application was not to interpose the writ of injunction, to protect the bank from a common and casual trespass of an individual, but from a total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. In that case, the state could not be made a party according to the 11th amendment of the constitution; the complainants being mere individuals, and not a sovereign state. But, according to my view of the present case, the state of Georgia is properly made a party defendant; the complainants, being a foreign state.

The laws of the state of Georgia in this case go as fully to the total destruction of the complainants' rights as did the law of Ohio to the destruction of the rights of the bank in that state; and an injunction is as fit and proper in this case to prevent the injury, as it was in that.

It forms no objection to the issuing of the injunction in this case, that the lands in question do not lie within the jurisdiction of this court. The writ does not operate in rem. but in personam. If the party is within the jurisdiction of the court, it is all that is necessary to give full effect and operation to the injunction; and it is immaterial where the subject matter of the suit, which is only affected consequentially, is situated. This principle is fully recognized by this court in the case of Massie *vs.* Watts, 6 Cranch, 157; when this general rule is laid down, that in a case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person may be found, although lands not within the jurisdiction of the court may be affected by the decree. And reference is made to several cases in the English chancery recognizing the same principle. In the case of Penn *vs.* Lord Baltimore, 1 Ves.
*80 444, a specific performance of a contract * respecting lands lying in North America was decreed; the chancellor saying, the strict primary decree of a court of equity is in personam, and may be enforced in all cases when the person is within its jurisdiction.

Upon the whole, I am of opinion,

1. That the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia.

2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion.

3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought therefore to be awarded.

And I am authorized by my brother Story to say, that he concurs with me in this opinion.

State of New Jersey, Complainant, v. State of New York

Supreme Court of the United States, 1831.

[5 *Peters*, 284.]

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution.

It has been settled, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution, and existing acts of congress. The rule respecting the process, the persons on whom it is to be served and the time of service, is fixed. The course of the court after due service of process has also been prescribed.

In a suit in this court instituted by a state against another state of the union, the service of the process of the court on the governor and attorney general of the state, sixty days before the return day of the process, is sufficient service.

At a very early period in our judicial history suits were instituted in this court against states, and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

After due service of the subpœna, the state which is complainant has a right to proceed ex parte; and if after the service of an order of the court for the hearing of the case, there shall not be an appearance, the court will proceed to a final hearing.

No final decree or judgment having been given in this court against a state, the question of proceeding to a final decree is not conclusively settled in this case, until the cause shall come on to be heard in chief.

The cases of the State of Georgia *vs.* Brailsford; Oswald *vs.* The State of New York; Chisholm's Executors *vs.* The State of Georgia; The State of New York *vs.* The State of Connecticut; Grayson *vs.* The Commonwealth of Virginia, cited, as to the jurisdiction and modes of proceeding in suits in which a state is a party.

MR. WIRT, for the complainant, stated, that the subpœna had been regularly served upwards of two months, and there was no appearance on the part of the state of New York.

The seventeenth section of the judiciary act of 1789, authorizes the court to make and establish all necessary rules for the conducting the business of the courts of the United States. This court has such a power without the aid of that provision of the law.

The seventh rule of this court, which is applicable to this matter, was made at August term 1791. "The chief justice, in answer to the motion of the attorney general, informs him and the bar, that this court consider the practice of the court of kings bench and of chancery, in England, as affording outlines for the
*285 practice of this court; and that they will from * time to time make such alterations therein as circumstances may render necessary. 1 Cond. Rep. viii.

In 1796 the tenth rule was adopted. "Ordered, that process of subpœna issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant on such service of the subpœna should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*." *Ibid.*

Construing these two rules together, they bring us in the case before the court, to that part of the English practice where the party may proceed to a hearing. There is no necessity for those proceedings here, which are resorted to in England to compel an appearance.

Nor would the practice in England be proper in the case before the court. The object of the bill is to quiet a title: it is a bill of peace. Here the rule considers the party when served with process, in the same situation as if he had appeared.

The question is what is to be done when all the process to compel an appearance is exhausted: what is the next step? It is to take the bill, pro confesso: but in England, formerly, by a standing rule in chancery, before this can be done the party must have appeared.

Afterwards, to prevent the process of the court being eluded, the statute of 25 Geo. II. was enacted, by which it was provided, that if no appearance was entered by one who had absconded, the court would make an order for an appearance, and if no appearance was entered, the bill should be taken pro confesso.

This statute regulated the practice in the courts of chancery of England in 1791, when the seventh rule of this court was adopted. But this statute applied only to the case of a party absconding, and it was only to force an appearance. In the present case, as has been observed, we stand as if all the proceedings for such a purpose had been exhausted.

Different practices prevail in relation to such a case in the several states of the union. In New Jersey the practice is to file the proofs in the cause, and proceed to a hearing. This is not the course which is pursued in Virginia.
*286 As to the practice in England, 2 Pr. Wm. 556. Moseley, 386. Har. * Chancery Practice, by Newland, 156. 1 Grant's Chancery Practice, 96.

Something is now to be done in this case: and it is for the court to determine what that may be. If the court desire it, it is fully competent to them to make any new rule relative to the future proceedings in the case.

In the court of chancery in England the party could take a decree, pro confesso, and consider it as final. But this is not the wish of the complainant. It is desired that the proceedings should be carried on with the utmost respect to the other party; and the wish of the state of New Jersey is to have an examination of the case, and a final decree after such an examination.

It is therefore proposed, that the court direct a rule to be entered that the bill be taken pro confesso, unless the party against whom it is filed appear and answer before the rule day in August next; and if they do not, that the cause be set down for a final hearing at the next term of this court, on such proofs as the complainants may exhibit.

Mr. Justice Baldwin suggested that it might be proper to argue certain questions arising in this case in open court: such as, what was the proper duty of the court in the case? what was the practice in England? and whether this court had power to proceed in suits between states without an act of congress having directed the mode of proceeding? he did not propose this as a matter personal to himself; but as a member of the court.

Mr. Wirt said that the jurisdiction which was to be exercised was given by the constitution, and the seventeenth section of the act of congress authorised the court to establish such rules as to the manner in which the power should be executed. There are cases in which the court have taken this jurisdiction. The case of Chisholm *vs.* The State of Georgia, 2 Dall. Rep. 219; 2 Condens. Rep. 635. Grayson *vs.* The State of Virginia, 3 Dall. Rep. 320; 1 Condens. Rep. 141.

When the subpœna was asked for at last term of this court, (3 Peters, 461), the case of Chisholm *vs.* The State of Georgia, was then particularly re-
*287 ferred to: and it was considered that although * the amendment to the constitution has taken away the jurisdiction of this court in suits brought by individuals against a state, it has left its jurisdiction, in suits between states in

the situation in which it stood originally. The court, in awarding the process of subpœna, had reference to these cases.

If an elaborate argument of the questions which the case presents is desired, time is asked to prepare for it; and sufficient time to give notice to the attorney general of the state of New Jersey to attend and assist in the argument.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

This is a bill filed by the state of New Jersey against the state of New York, for the purpose of ascertaining and settling the boundary between the two states.

The constitution of the United States declares that "the judicial power shall extend to controversies between two or more states." It also declares that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction."

Congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state, or in any suit in which the supreme court is to exercise the original jurisdiction conferred by the constitution.

The act to establish the judicial courts of the United States, section 13, enacts "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens; in which latter case it shall have original but not exclusive jurisdiction." It also enacts section 14, that all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." By the seventeenth section it is enacted, "that all the said courts of the United States shall have power" "to make and establish all necessary rules for the ordinary
*288 conducting business in the * said courts, provided such rules are not repugnant to the laws of the United States."

"An act to regulate processes in the courts of the United States" was passed at the same session with the judicial act, and was depending before congress at the same time. It enacts "all writs and processes issuing from the supreme or a circuit court shall bear teste," &c. This act was rendered perpetual in 1792. The first section of the act of 1792 repeats the provision respecting writs and processes, issuing from the supreme or a circuit court. The second continues the form of writs, &c. and the forms and modes of proceeding in suits at common law prescribed in the original acts, and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States: subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

At a very early period in our judicial history, suits were instituted in this court against states; and the questions concerning its jurisdiction and mode of proceeding were necessarily considered.

So early as August 1792, an injunction was awarded at the prayer of the

state of Georgia, to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia under her acts of confiscation. This was an exercise of the original jurisdiction of the court, and no doubt of its propriety was ever expressed.

In February 1793 the case of Oswald *vs.* The State of New York came on. This was a suit at common law. The state not appearing on the return of the process, proclamation was made, and the following order entered by the court. "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said state."

*289 * At the same term, the case of Chisholm's Executors *vs.* The State of Georgia came on and was argued for the plaintiffs by the then attorney general, Mr. Randolph. The judges delivered their opinions seriatim; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair decided in favour of the jurisdictior of the court; and that the process served on the governor and attorney general of the state was sufficient. Mr. Justice Iredell thought an act of congress necessary to enable the court to exercise its jurisdiction.

After directing the declaration to be filed and copies of it to be served on the governor and attorney general of the state of Georgia, the court ordered, "that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the 1st day of the next term, judgment by default shall be entered against the said state."

In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry was awarded, but the eleventh amendment to the constitution prevented its execution.

Grayson *vs.* The State of Virginia, 3 Dal. 320, 1 Peters's Cond. Rep. 141, was a bill in equity. The subpœna having been returned executed; the plaintiff moved for a distringas, to compel the appearance of the state. The court postponed its decision on the motion, in consequence of a doubt whether the remedy to compel the appearance of the state should be furnished by the court itself, or by the legislature. At a subsequent term, the court, "after a particular examination of its power," determined that though "the general rule prescribed the adoption of that practice which is founded on the custom and usage of courts of admiralty and equity," "still it was thought that we are also authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country, subject to the interposition, alteration, and control of the legislature. We have therefore agreed to make the following general orders.

"1. Ordered, that when process at common law or in equity shall issue against a state, the same shall be served upon the governor or chief executive magistrate, and the attorney general of such state.

*290 * 2. Ordered, that the process of subpœna issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and farther, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*." 3 Dall. 320; 1 Peters's Cond. Rep. 141.

In Huger et al. *vs.* The State of South Carolina, the service of the subpœna

having been proved, the court determined that the complainant was at liberty to proceed *ex parte*. He accordingly moved for and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. Rep. 371; 1 Peter's Cond. Rep. 156.

Fowler et al. *vs.* Lindsey et al. and Fowler *vs.* Miller, 3 Dall. 411; 1 Peter's Cond. Rep. 189, were ejectments depending in the circuit court for the district of Connecticut, for lands over which both New York and Connecticut claimed jurisdiction. A rule to show cause why these suits should not be removed into the supreme court by *certiorari* was discharged, because a state was neither nominally nor substantially a party. No doubt was entertained of the propriety of exercising original jurisdiction, had a state been a party on the record.

In consequence of the rejection of this motion for a certiorari, the state of New York, in August term 1799, filed a bill against the state of Connecticut, 4 Dall. 1, 1 Peter's Cond. Rep. 203, which contained an historical account of the title of New York to the soil and jurisdiction of the tract of land in dispute; set forth an agreement of the 28th of November 1783, between the two states on the subject; and prayed a discovery, relief, and injunction to stay the proceedings in the ejectments depending in the circuit court of Connecticut. The injunction was, on argument, refused; because the state of New York was not a party to the ejectments, nor interested in their decision.

It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the
*291 time of service are fixed. The course of the court on the failure * of the state to appear, after the due service of process, has been also prescribed.

In this case the subpœna has been served as is required by the rule. The complainant according to the practice of the court, and according to the general order made in the case of Grayson *vs.* The Commonwealth of Virginia, has a right to proceed ex parte; and the court will make an order to that effect, that the cause may be prepared for a final hearing. If upon being served with a copy of such order, the defendant shall still fail to appear or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision thereof. But inasmuch as no final decree has been pronounced or judgment rendered in any suit heretofore instituted in this court against a state; the question of proceeding to a final decree will be considered as not conclusively settled, until the cause shall come on to be heard in chief.

Mr. Justice BALDWIN did not concur in the opinion of the court directing the order made in this cause.

The subpœna in this cause having been returned executed sixty days before the return day thereof, and the defendant having failed to appear, it is, on motion of the complainant, decreed and ordered, that the complainant be at liberty to proceed ex parte: and it is further decreed and ordered, that unless the defendant, being served with a copy of this decree sixty days before the ensuing August term of this court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill.

State of New Jersey v. State of New York.

Supreme Court of the United States, 1832.

[6 *Peters*, 323.]

At January term 1831, an order was made, giving the state of New York leave to appear in this case on the second day of this term and answer the complainants' bill; and if there should be no appearance, that the court would proceed to hear the cause on the part of the complainants, and to decree on the matter of the bill. On the first day of the term, a demurrer to the complainants' bills was filed, which was signed, "Greene C. Bronson, attorney-general of New York." No other appearance was entered on the part of the defendants. By the Court: the demurrer filed in the case by the attorney-general of New York, he being a practitioner in this court, is considered as an appearance for the state. If the attorney-general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court.

The demurrer being admitted as containing an appearance by the state of New York, it amounts to a compliance with the order of the court.

A demurrer is an answer in law to the bill, though not, in a technical sense, an answer according to the common language of practice.

MR. FRELINGHUYSEN, with whom was Mr. Wirt, stated, that at the last court an order was made, giving the state of New York leave to appear on the second day of this term and answer the bill of the complainants; and if there should be no appearance, the court would proceed to hear the cause on the part of the complainants, and to decree on the matter of the bill. (5 Peters, 291.) Instead of appearing, the state of New York has demurred; and this mode of proceeding is resisted in a written argument, which is now handed to the court.

Mr. Beardsley stated, that he had filed and served the demurrer for the attorney-general of New York. He was not counsel in this cause for New York, nor was any counsel, to his knowledge, in the city who represented that state. The attorney-general was not expected until the argument of the demurrer should come on. As he had filed the demurrer as agent for the attorney-general, he would, with the permission of the court, make a few suggestions.

He asked if the court would entertain a motion of this kind without notice.

The application is to take a paper off the files of the court, not to prevent
*324 it being filed. It has been filed. * The attorney-general of New York, no doubt, considers the demurrer as an appearance in the cause; although it contains a suggestion that the court has no jurisdiction. Such a suggestion must at all times be unobjectionable, but in this case it was peculiarly proper; as this court, in granting the order of the last term observed, that "the question of proceeding to a final decree would be considered as not conclusively settled, until the cause should come on to be heard in chief." The demurrer must have been intended as an appearance; and is one in its terms, as will be seen by a reference to it.

It may be, that no appearance has been formally entered on the minutes of the clerk: he had not looked at those minutes. The entry of an appearance was mere form; and the filing of a demurrer was ample authority for making such entry, if at all necessary.

In England, the filing a demurrer is considered as an appearance in the cause. Upon this, the authorities, he supposed, were uniform.

The terms of the demurrer show that it constitutes an appearance. It asserts that the people of New York are not bound to appear, and insists that they

should not be prejudiced by appearing. The conclusion prays "judgment," and "judgment whether any further answer should be required." This is placing the case upon the judgment of the court; and must be considered, from the very force and meaning of the terms, as an appearance in the cause, and an authority to enter an appearance with the clerk.

The order of this court, which was granted at last term, was that the people of the State of New York shall "appear" and "*answer* the bill of the complainant." That is, that they shall appear and defend; and the court, by granting that rule, did not intend to decide on the jurisdiction of the court in the case, or to preclude the defendants from putting in a demurrer, if they thought proper to do so. The order was not intended to discriminate, strictly, between an answer and a demurrer.

No rules have been established for regulating the course of proceedings in such cases, the English rules may therefore be appealed to and invoked. Why shall not this court permit a demurrer to be filed? And why may not this form be pursued, as well as a plea or answer, setting up matter of fact?

*325 * The order of the court was not intended to prevent the proceedings in the case being in any form which might be thought proper, in order to present the question of jurisdiction and the merits of the case. A demurrer admits all facts well stated in the bill. Why require an answer, if the defendants are willing to admit the facts alleged? Certainly the plaintiff should not object. In New York, when a bill is filed, and process duly served, the order is to appear and answer; and not that he answer, demur or plead: such he supposed was the order in the English chancery. No one was ever defaulted in such case, by reason of his filing a demurrer or plea instead of an answer. A demurrer is indeed an answer *in law*, and so strictly and literally within the order.

If this is the interpretation of the rule granted at last term, the demurrer is a sufficient compliance with the rule. If it requires the signature of a solicitor of this court, as such, it will no doubt have such a signature: it is contended, however, that the signature of the attorney-general, known by the records of the court to be one of its solicitors, is sufficient, although he has not in terms signed as solicitor.

In a case like this, the signature of the attorney-general, as such ought to be abundantly sufficient; and indeed it is the only way in which a defence can properly be made. He is the law officer of the state; the sole law officer of the state. Process in this cause was served on him as such law officer. Certainly, then, the plaintiff should not object, that he is not authorised to appear for New York; or that he should have signed as solicitor, and not as attorney-general. He has been recognized by the plaintiff, and by the court, as the proper law officer of New York, to appear and defend this cause.

But if, by the strict rules of English practice, the filing of the demurrer in its present form is not sufficient, as this is a new and a special case, the court will not enforce the rule without notice; no disrespect on the part of the attorney-general could have been intended. By the English authorities it will be seen that a defendant failing to appear, may appear and demur as well as answer, at any time until affected by process of contempt. 3 Bro. Ch. cases 372; 10 Ves. 444.

Mr. Beardsley said he had thus interfered, without having been au-

*326 thorised to act for the state of New York. Having been * requested by the attorney-general of New York to deliver the demurrer to the clerk of the court, he had done so and from his knowledge of the views of the attorney-general, he felt himself at liberty to say, that he designed to appear and argue the demurrer, when reached on the calendar; although he could not at all have anticipated an application like the present. As he had not perused the written

argument which had been handed to the court, he could not suppose, he had furnished an answer to all its views; he, however, would not trouble the court further.

Mr. Frelinghuysen. The demurrer which is before the court is an insulated paper. No one has been directed by the authorities of New York to appear in this court: and no solicitor has appeared in the cause.

In truth, the very gist of the question which is presented to the court is, whether there has been an appearance in the case. Three years have passed since the institution of this suit; and the first notice which was taken of the proceeding by the state of New York, was by a communication addressed to the court, by the attorney-general of the state, informing the court that the state would not appear. 3 Peters, 461. Now, the period for an appearance and answer has gone by; and instead of an appearance, a paper is filed, stating that the state of New York is not bound to appear. The attorney-general of New York is not known as such to this court. It can only know the parties or their solicitors; and although he may be a solicitor of the court, yet he cannot be known as a solicitor in the case, unless by his special acknowledgment that he is such. If the gentleman who has addressed the court on behalf of the attorney-general will enter his appearance in the case, the whole of the difficulty will be removed. It is admitted that a demurrer signed by a solicitor of the court, is an appearance in the cause in which it is filed: but this is not that case. This court can only know what was intended, by what has been done: and New York having failed to appear and answer, by the time fixed in the rule, the case must now be put on its merits.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

*327 * The court have had the return made in this case under consideration.

It considers the demurrer filed in this case by the attorney-general of New York, as being an appearance for the state, he being a practitioner in this court; and therefore, that the demurrer is regularly filed. If the attorney general did not so mean it, it is not a paper which can be considered as in the cause, or be placed on the files of the court. We say this now, that the attorney-general may have due notice, if he did not intend to enter any appearance for the state; it being otherwise a paper not to be received.

The demurrer, then, being admitted as containing an appearance by the state, the court is of opinion, that it amounts to a compliance with the order at the last term. In that order, the word "answer," is not used in a technical sense, as an answer to the charges in the bill under oath; but an answer, in a more general sense, to the bill. A demurrer is an answer in law to the bill, though not in a technical sense an answer according to the common language of practice.

The court, therefore, direct the demurrer to be set down for argument, on the first Monday of March of this term, according to the motion of the plaintiffs.

State of Rhode Island, Complainant, v. State of Massachusetts.

Supreme Court of the United States, 1833.

[7 *Peters,* 651.]

Subpœna will be awarded by the Court, at complainant's request, in suits between States in Supreme Court of the United States.

MR. ROBBINS, solicitor for the complainant, having renewed his motion of last term in this case, prayed the court to award such process, and in such form, as the court may deem proper.

On consideration of the motion made in this case, it is now here ordered by the court that process of subpœna be, and the same is hereby awarded, as prayed for by the complainant, and that said process issue against "The commonwealth of Massachusetts."

State of Rhode Island v. State of Massachusetts.

Supreme Court of the United States, 1837.

[11 *Peters,* 226.]

In a case depending between the states of Rhode Island and Massachusetts, the senior counsel appointed to argue the cause for the state of Rhode Island, by the legislature, was prevented, by unexpected and severe illness, attending the Court; the Court, on the application of the attorney-general of the state, ordered a continuance for the term.

Mr. Green, the attorney-general of the State of Rhode Island, moved the court for a continuance of this cause.

He stated, that at session of the general assembly of Rhode Island, in January, 1836, a resolution was passed, associating Mr. Hazard, with the attorney-general of the state, as counsel in the cause. Mr. Hazard had since been attacked with a disease, which was supposed to be temporary in its character; and until within a few days, confident expectations of his recovery, and that he would be able to attend and argue this case, were entertained. By an arrangement with the attorney-general of Massachusetts, attending the Court, this case has been left open, in the hope of the arrival of Mr. Hazard. This hope no longer exists; as his indisposition has increased, so as to prevent his commencing the journey from Rhode Island to this place.

Mr. Hazard is the senior counsel in the case, and has been relied upon by the state of Rhode Island to argue it. It was his report, as chairman of the committee of the legislature of the state, upon which the resolution of that body was adopted, ordering this bill against the state of Massachusetts to be filed. No other counsel has been employed to argue the cause in the place of Mr. Hazard; and, at the advanced period of the session of this Court at which this motion is submitted, no counsel can be prepared to go into the argument.

Questions between the different states of the Union, are always of deep concern and of high importance. An appeal to this Court for the decision of such questions, is an application to the highest powers of the Court. Where these

questions are for a part of the territory in possession of either of the contending states, occupied by a large population, they become of the deepest and highest interest. Such is the present controversy.

*227 * It is submitted, that this Court will not apply the strict rules which govern other cases to this. The peace and tranquillity of the Union may be disturbed by the decision of such a case, however just and proper; if a belief shall prevail, that every opportunity for its full and complete discussion was not afforded to each party. Although no imputation of wrong would be charged to this Court, which, in conformity with its established rules, had proceeded to the decision of the cause, against the party opposing the application of those rules, under an existing or asserted disadvantage to the opposing party; strong feelings of dissatisfaction and discontent might prevail: always, if possible to be prevented between the citizens of neighbouring commonwealths.

The questions which will be raised in the argument of this case, are of great and general importance; and some of them have not been decided. Questions of the jurisdiction of this Court in a case between two states; and whether, if it exists, provision has been made by legislation for its exercise, are involved; and must be determined in the final disposition of the cause. These questions were raised in the case of The State of New Jersey v. The State of New York, but they were not decided. The weight and interest of these questions were felt, when that case was before this Court some years since. The controversy between those states was adjusted by commissioners, and the case was not decided here.

To the state of Massachusetts the postponement of the final decision of this case to the next term, can do no injury. She is in possession of the territory which is claimed by Rhode Island, and the inhabitants of the same are subject and obedient to her laws. Rhode Island, this Court will believe, does not, on other than grounds which she considers will sustain her claims, come into this high tribunal to assert her rights to that territory. Although the bill in this case was filed by a gentleman who is a member of this bar, Mr. Robbins, yet he was never counsel in the case, but acted only as the representative of the attorney-general of Rhode Island, in presenting it to this Court. By the act of God the state is deprived of the assistance of the counsel on which she relied in this cause; and this Court, it is hoped, will order the postponement which has been asked. In the state of Rhode Island, illness of counsel is a sufficient ground for the continuance of a cause, depending in a state court.

Mr. Austin, the attorney-general of the state of Massachusetts, opposed the continuance.

*228 * The state of Massachusetts is before the Court, represented by counsel, and this at very considerable expense. She had notice that the case would be argued at this term; and she has attended in conformity with this requisition. The case is one of a character which gives it a peculiar interest; and which, while it is unsettled, affects the tranquillity of not less than five thousand persons, who are inhabitants of the territory claimed by Rhode Island.

No difference exists between states and individuals in suits depending before this Court; if any do exist, the case of a state brought here to defend her possession of her territory, and her jurisdiction over a part of her population in the occupation of it; has a strong claim to obtain an early decision of the court.

The state of Rhode Island has chosen to come to this Court, and she should be at all times prepared to sustain her claim for the interference of the Court, in a controversy which she has brought forward, and has chosen her own time for its presentation.

It is admitted that the indisposition of counsel may furnish an inducement to a court to postpone a cause, until a subsequent day in term; but it cannot be

the foundation for a continuance for the whole term. It appears that the bill which was filed on the commencement of this cause, was signed by a gentleman of this bar, now in the city of Washington, Mr. Robbins, a member of the senate; and thus Rhode Island is represented by two most able counsel.

The cause has been pending for six years; and two years have passed since the answer of the state of Massachusetts was filed: since which the cause could have been disposed of, at either of the two terms which have occurred subsequent to the putting in of the answer.

While every disposition to accommodate the wishes of the counsel representing the state of Rhode Island exists, and the circumstances under which the motion has been made, are fully appreciated; as the official representative of the state of Massachusetts, Mr. Austin stated, that he could not consent to the continuance of the cause.

Mr. Chief Justice TANEY, on the day following the argument on the motion, said: the Court had decided to order the cause to be continued.

State of Rhode Island and Providence Plantations, Complainants v. State of Massachusetts, Defendant.

Supreme Court of the United States, 1838.

[12 *Peters*, 657.]

The Supreme Court has jurisdiction of a bill filed by the state of Rhode Island against the state of Massachusetts, to ascertain and establish the northern boundary between the states; that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs; and they be quieted in the enjoyment thereof, and their title; and for other and further relief.

Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.

An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the power of the court over the parties, or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill.

The Supreme Court is one of limited and special original jurisdiction. Its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed is coram non judice, and its action a nullity. And whether the want or excess of power is objected by a party, or is apparent to the Court, it must surcease its action, or proceed extra-judicially.

The several states of the United States, in their highest sovereign capacity, in the convention of the people thereof, on whom, by the revolution, the prerogative of the crown and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the constitution; by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained that this judicial power, in cases where a

state was a party, should be exercised by the Supreme Court, as one of original jurisdiction. The states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases; but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority, as their agent for executing the judicial power of the United States in the cases specified. Massachusetts has appeared, submitted to the process in her legislative capacity; and plead in bar of the plaintiff's action certain matters on which the judgment of the Court is asked. All doubts as to jurisdiction over the parties are thus at rest, as well by the grant of power by the people, as the submission of the legislature to the process; and calling on the Court to exercise its jurisdiction on the case presented by the bill, plea, and answer.

Although the constitution does not in terms extend the judicial power to all controversies between two or more states; yet it in terms excludes none, whatever may be their nature or subject.

This Court, in construing the constitution as to the grants of powers to the United
*658 * States, and the restrictions upon the states, has ever held, that an exception of any particular case presupposes that those which are not excepted, are embraced within the grant or prohibition: and have laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication or construction.

In the construction of the constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy.

The boundary established and fixed by compact between nations becomes conclusive upon all the subjects and citizens thereof, and binds their rights; and is to be treated, to all intents and purposes, as the true real boundary. The construction of such compact is a judicial question.

There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this Court when a state is a party, the power is here, or it cannot exist.

This Court exists by a direct grant from the people of their judicial power; it is exercised by their authority, as their agent, selected by themselves, for the purposes specified. The people of the states, as they respectively become parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory.

No court acts differently in deciding on boundary between states, than on lines between separate tracts of land. If there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes. It is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be.

There is neither the authority of law or reason for the position, that boundary between nations or states is, in its nature, any more a political question than any other subject on which they may contend. None can be settled without war or treaty which is by political power; but, under the old and new confederacy, they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before.

It has been contended that this Court cannot proceed in this cause without some process

and rule of decision prescribed appropriate to the case; but no question on process can arise on these pleadings: none is now necessary, as the defendant has appeared and plead, which plea in itself makes the first point in the cause, without any additional proceeding; that is, whether the plea shall be allowed, if sufficient in law, to bar the complaint, or be overruled, as not being a bar in law, though true in fact.

This Court cannot presume that any state which holds prerogative rights for the good of its citizens, and by the constitution, has agreed that those of any other state shall enjoy rights, privileges, and immunities in each as its own do, would either do wrong, or
*659 deny right to a sister state or its citizens, or refuse to submit * to those decrees of this Court, rendered pursuant to its own delegated authority; when in a monarchy. its fundamental law declares that such decree executes itself.

In the case of Olmstead, this Court expressed its opinion, that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal. So fatal a result must be deprecated by all; and the people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

ON the 16th of March, 1832, the state of Rhode Island, by their solicitor, filed a bill against the state of Massachusetts, for the settlement of the boundary between the two states; and moved for a subpœna to be issued, according to the practice of the Court, in similar cases.

This motion was held under advisement until the following term; and subpœna was awarded and issued on the 2d of March, 1833.

This subpœna was returned with service on the 30th July, 1833; and on the 18th January, 1834, the appearance of Mr. Webster was entered for the defendants; and on his motion, the cause was continued with leave to plead, answer, or demur.

On the 12th January, 1835, a plea and answer was filed by Mr. Webster: and on the 22d of February, 1836, by agreement of counsel, it was ordered by the Court, that the complainant file a replication to the answer of the defendant, within six months from the last day of January term, 1836, or that the cause shall stand dismissed. The complainant filed a replication on the 18th of August, 1836; and at the same term, a "notice of intention to move the Court for leave to withdraw the replication, upon the ground that the rule requiring the same was agreed to and entered into by mistake."

The bill filed by the complainants, set forth the original charter granted on the 3d day of November, 1621, by King James the First, to the council at Plymouth, for planting, ruling, ordering and governing New England, in America, describing the limits and boundaries of the territory so granted. The grant or conveyance to the council at Plymouth, of the 19th of March, 1628, to Sir Henry Rosewell and others, of a certain tract of land described in the same, as "all that part of New England, in America, aforesaid, which lies and extends between a great river there, commonly called Monomack, alias Merrimac, and a certain other river, there called Charles river, being in the bottom of a certain bay, there commonly called Massachusetts, alias Mattachusetts, alias Massatusetts,
*660 bay; and also all and * singular those lands and hereditaments, whatsoever, lying within the space of three English miles on the south part of the said Charles river, or of any or every part thereof: and, also, all and singular the lands and hereditaments, whatsoever, lying and being within the space of three English

miles to the southward of the southernmost part of the said bay, called Massachusetts, alias Mattachusetts, alias Massatusetts bay; and, also, all those lands and hereditaments, whatsoever, which lie and be within the space of three English miles to the northward of the said river, called Monomack, alias Merrimac, or to the northward of any and every part thereof, and all lands and hereditaments, whatsoever, lying within the limits aforesaid, north and south in latitude and breadth, and in length and longitude of and within all the breadth aforesaid, throughout the main lands there, from the Atlantic and western sea and ocean on the east part, to the South sea on the west part." The letters patent of confirmation and grant of Charles the First, of 4th of March, 1629, to Sir Henry Rosewell and others, for the lands included in the charter of James the First; and the deed of the council of Plymouth to them, by the name of "The Governor and Company of Mattachusetts Bay in New England," incorporated by the said letters patent.

The bill further states that on the 7th day of June, 1635, the council established at Plymouth for planting a colony and governing New England, in America, yielded up and surrendered the charter of James the First, to Charles the First; which surrender was duly and in form accepted. That after the granting of the letters patent, before set forth, and prior to the granting of the letters patent afterwards set forth in the bill to the colony of Rhode Island and Providence Plantations, the tract of land comprised within the limits of the state of Rhode Island and Providence Plantations, had been colonized and settled with a considerable population by emigration, principally from England and the colony of the Massachusetts bay; and that the persons who had so colonized and settled the same were seised and possessed, by purchase and consent of the Indian natives, of certain lands, islands, rivers, harbors and roads, within said tract. That on the 8th of July, 1663, King Charles the Second, by letters patent, granted a charter of incorporation to William Brenton, John Coddington and others, by the name of "The Governor and Company of the English Colony of Rhode Island and Providence Plantations in New England, in America;" and granted and con-
*661 ferred to the corporation, by the letters patent, "all that part of * our dominions in New England, in America, containing the Nahantick and Nanhygansett, alias Narragansett, bay, and countries and parts adjacent, bounded on the west or westerly to the middle or channel of a river there, commonly called and known by the name of Pawcatuck, alias Pawcawtuck river; and so along the said river as the greater or middle stream thereof reacheth or lies up into the north country, northward unto the head thereof; and from thence, by a straight line drawn due north until it meets with the south line of the Massachusetts colony; and on the north or northerly by the aforesaid south or southerly line of the Massachusetts colony or plantation; and extending towards the east or eastwardly three English miles, to the east and north-east of the most eastern and north-eastern parts of the aforesaid Narragansett bay, as the said bay lieth or extendeth itself from the ocean on the south or southwardly, unto the mouth of the river which runneth towards the town of Providence; and from thence along the eastwardly side or bank of the said river, (higher called by the name of Seacunck river) up to the falls called Patucket falls, being the most westwardly line of Plymouth colony; and so from the said falls, in a straight line due north until it meet with the aforesaid line of the Massa-

chusetts colony, and bounded on the south by the ocean. And, in particular, the lands belonging to the town of Providence, Pawtuxet, Warwick, Nisquammacock, alias Pawcatuck, and the rest upon the main land in the tract aforesaid, together with Rhode Island, Block Island, and all the rest of the islands and banks in the Narragansett bay, and bordering upon the coast of the tract aforesaid, (Fisher Island only excepted,) together with all firm lands, soils, grounds, havens, ports, rivers, waters, fishings, mines royal, and all other mines, minerals, precious stones, quarries, woods, wood grounds, rocks, slates, and all and singular other commodities, jurisdictions, royalties, privileges, franchises, pre eminences and hereditaments, whatsoever, within the said tract, bounds, lands, and islands, aforesaid, or to them, or any of them, belonging or in any wise appertaining."

The bill proceeds to state the cancelling and vacating of the charter to "The Governor and Company of Massachusetts bay in New England," on a scire facias; and afterwards the re grant of the same territory, with other territories known by the name of the colony of Massachusetts Bay and colony of New Plymouth, the province of Maine, &c., by King William and Queen
*662 Mary, on the 7th of * October, 1691. The description of the territory then granted, so far as the same is important in this case, was the following:

"All that part of New England, in America, lying and extending from the great river commonly called Monomack, alias Merrimack, on the north part, and from three miles northward of the said river to the Atlantic or western sea or ocean on the south part, and all the lands and hereditaments whatsoever, lying within the limits aforesaid, and extending as far as the outermost points or promontories of land called Cape Cod and Cape Malabar, north and south, and in latitude, breadth, and in length and longitude of and within all the breadth and compass aforesaid, throughout the main land there, from the said Atlantic or western sea and ocean on the east part, towards the South sea, or westward, as far as our colonies of Rhode Island, Connecticut, and the Narragansett country. And, also, all that part and portion of main land, beginning at the entrance of Piscataway harbour, and so to pass up the same into the river of Newichwannock, and through the same, into the furthest head thereof, and from thence northwestward, till one hundred and twenty miles be finished, and from Piscataway harbour mouth, aforesaid, north-eastward, along the sea coast to Sagadehock, and from the period of one hundred and twenty miles, aforesaid, to cross over land to the one hundred and twenty miles before reckoned up into the land from Piscataway harbour, through Newichwannock river, and also the north half of the Isles of Shoals, together with the Isles of Capawock and Nantuckett, near Cape Cod aforesaid; and also the lands and hereditaments lying and being in the country or territory commonly called Accada or Nova Scotia; and all those lands and hereditaments lying and extending between the said country or territory of Nova Scotia and the said river of Sagadehock, or any part thereof."

The bill states, that the province of Massachusetts and the colony of Rhode Island and Providence Plantations, thus established, continued under the charters and letters patents, until July 4, 1776, when with their sister colonies they became independent states. The bill alleges the dividing boundary line, under the letters patent and charter to the colony of Rhode Island and Providence Plantations and Massachusetts, to have been "a line drawn east and west three

English miles south of the river called Charles river, or of any or every part thereof." That for some years after the granting of the charter to Rhode Island, the lands included in the colony adjoining Massachusetts, remained wild
*663 and uncultivated, and were of little value; * that previous to 1709, the inhabitants of Rhode Island entered on parts of the land and made improvements; and that the said northern boundary line never having been settled, defined or established, disputes and controversies arose between the inhabitants of the province of the Massachusetts Bay and of the colony of Rhode Island and Providence Plantations, and between the governments of the said province and colony, in relation to the boundary of said colony.

The bill proceeds to state, that in consequence of various disputes and controversies about the boundary between the two colonies, numerous efforts were made to adjust and settle the same; all of which, as the bill alleges, were not productive of a satisfactory result to the colony of Rhode Island and Providence Plantations; and to the state of Rhode Island, afterwards established.

These are particularly set forth in the bill; and the proceedings of the legislatures of Rhode Island and Massachusetts are given at large in the same, with the operations of the commissioners appointed and acting under the authority thereof. After stating the efforts made by the two states both whilst colonies and after they became independent states, for the determination of the line, up to 1791: alleged to have been abortive and without success; the bill proceeds to state, "That on or about the year of our Lord one thousand seven hundred and nine, other commissioners were appointed by the said state of Rhode Island and Providence Plantations and the said state of Massachusetts, for the purpose of ascertaining and settling the said northern line of the said state of Rhode Island and Providence Plantations; that the said last mentioned commissioners respectively, continued such commissioners until the year of our Lord one thousand seven hundred and eighteen; and that the said last mentioned commissioners had several meetings, but were never able to agree upon and settle, and never did agree upon and settle, the said northern line of the said state of Rhode Island and Providence Plantations."

The bill asserts the right of Rhode Island to the territory in dispute; that Massachusetts was in possession of the same, and exercises and asserts sovereignty and jurisdiction over the same, under the pretences that the same was included in the grants or charters from the crown of England, under the mistaken belief that the line, three miles south of Charles river (a station having been fixed by Nathaniel Woodword and Solomon Saffrey, as the point three miles south of Charles river,) actually runs where Massachusetts has assumed it to run:
*664 and alleging that the line as it is claimed, and has always been * claimed by Massachusetts, was settled and adjusted by the commissioners acting under the authority of the parties respectively.

The bill proceeds to show the errors of proceedings of the commissioners acting for the two colonies; and states, "That no mark, stake or monument at that time existed, by which the place in which said Woodword and Saffrey, were so as aforesaid alleged to have set up a stake, could then be ascertained. That the person who executed, witnessed and consented to the said pretended agreement, did not, nor did any or either of them, go to any place where said stake was alleged to have been set up; nor did they, or any or either of them, make any survey, or cause any survey to be made, or run any line or lines, or cause any

line or lines to be run, or take any other means to ascertain at what place, if any, the said stake was set up by said Woodword and Saffrey; nor whether the place in which the said stake was alleged as aforesaid to have been set up by the said Woodword and Saffrey, was in fact three English miles and no more, south of the river called Charles river, or of any or every part thereof; nor whether the said line, alleged in said pretended agreement to have been run by the said Woodword and Saffrey, was ever in fact run by said Woodword and Saffrey; nor whether said pretended line was the true and proper boundary line between the said province of the Massachusetts Bay on the north and the said colony of Rhode Island and Providence Plantations on the south, according to the true intent and meaning of the grants contained in the respective charters or letters patent aforesaid."

The bill asserts, that the line designated and run under the agreements, has always been resisted by Rhode Island, while a colony, and since she became a sovereign state; and that no other boundary than that asserted in the bill between Rhode Island and Massachusetts, than that defined, granted and established in any by the respective charters and letters patent aforesaid therein before set forth, according to the true and fair construction thereof, has ever been consented to, or admitted to be the true boundary line by the complainants; either while she continued under the royal government, or since she became an independent and sovereign state. The proceedings of Massachusetts are alleged to "interfere with and prevent the exercise of that jurisdiction and sovereignty which, by the law of the land and the constitution of the Union, she is entitled to exercise over the whole tract of land mentioned and described in the charter or letters patent granted to the said colony of Rhode Island and Providence
*665 * Plantations, and hereinbefore set forth, and over the citizens and inhabitants thereof, according to her claims in this her bill made."

The bill asks, that inasmuch as the complainants have no satisfactory relief on the common law side of the Court, "especially as the controversy concerns questions of jurisdiction and sovereignty," that the commonwealth of Massachusetts answer the matters set forth in the bill; and that "the northern boundary line between the complainants and the state of Massachusetts may, by the order and decree of this honorable Court, be ascertained and established; and that the rights of jurisdiction and sovereignty of the complainants to the whole tract of land, with the appurtenances mentioned, described and granted in and by the said charter or letters patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, an east and west line drawn three miles south of the waters of said Charles river, or of any or every part thereof, may be restored and confirmed to the complainants, and the complainants may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; and the title, jurisdiction and sovereignty of the said state of Rhode Island and Providence Plantations over the same be confirmed and established, by the decree of the Court; and that the complainants may have such other and further relief in the premises, as to 'the' Court shall seem meet and consistent with equity and good conscience."

"The plea and answer of the commonwealth of Massachusetts, to the bill of complaint of the State of Rhode Island," alleges, that in 1642, for the purpose of

ascertaining the true southern boundary line of Massachusetts, a station or monument was erected and fixed at a point south of Charles river taken and believed to be on the true and real boundary line of the colony of Massachusetts; which monument became and has ever since been well known and notorious, and then was and ever since had been, called Woodword and Saffrey's station, on Wrentham Plains: and after the fixing of said station, and after running of the line aforesaid, and after the granting of the charter of Rhode Island, and while all the territory north of said station and line was claimed, held, and possessed, and jurisdiction over the same exercised and enjoyed by Massachusetts, as parcel of her own territory, about the year 1709, dispute and controversy having arisen between the two governments respecting the said boundary line,

*666 * persons were appointed by the government of Rhode Island and by the government of Massachusetts, to settle the misunderstanding about the line between the colonies; and what the persons appointed should agree upon, should be for ever after taken and deemed to be the stated lines and bounds, so as the agreement be drawn up in writing, and indented, under their hands and seals, within six months as aforesaid.

That afterwards, on the 19th January, 1710, the commissioners appointed by the colonies met, and entered into an "agreement of the partition line betwixt the colony of Massachusetts and the colony of Rhode Island," by which it was declared: "That the stake set up by Nathaniel Woodword and Solomon Saffrey, skilful approved artists, in the year of our Lord one thousand six hundred and forty-two, and since that often renewed, in the latitude of 41° 55′, being three English miles distant southward from the southernmost part of the river called Charles river, agreeable to the letters patent for the Massachusetts province, be accompted and allowed, on both sides, the commencement of the line between the Massachusetts and the colony of Rhode Island, and to be continued betwixt the said two governments, in such manner as that, after it has proceeded between the said two governments, it may pass over Connecticut river, at or near Bissell's house; as is decyphered in the plan and tract of that line, by Nathaniel Woodword and Solomon Saffrey."

By this agreement, on a presumption that there had been error in setting up the station, certain surveys had been made within the line of Massachusetts, thus ascertained, it stipulated that there should "be and remain unto the said town of Providence and inhabitants of the government of Rhode Island and Providence Plantations, a certain tract of land of one mile in breadth, to the northward of the said line of Woodword and Saffrey, as before described and platted, beginning from the great river of Pautucket, and so to proceed at the north side of the said patent line, of equal breadth, until it come to the place where Providence west line cuts the said patent line, supposed to contain 5000 acres, be the same more or less; the soil whereof shall be and remain to the town of Providence, or others, according to the disposition thereof to be made by the government of Rhode Island aforesaid. Nevertheless, to continue and remain within the jurisdiction and government of her majesty's province of the Massachusetts Bay, any thing in this agreement to the contrary thereof, or seemingly so, notwithstanding."

*667 * The agreement contained other provisions for the preservation of the line, and for the ascertaining the surveys made by the inhabitants of

Providence within the same; so that they might proceed with the settlement and improvement thereof.

This agreement was executed under the hands and seals of the commissioners, and was witnessed by persons on the part of the two colonies.

The plea and answer alleges, that the whole of the real and true merits of the complainants' supposed cause of action were fully heard, tried, and determined by the judgment and agreement of the commissioners; that the same was a full settlement of all the matters in controversy, and was made in good faith; and the station so fixed and established, became matter of common notoriety, and the line capable of being always known and ascertained.

The answer and plea further states, that afterwards, on or about June 18th 1717, to complete the settling and running the line between the two governments, the general assembly of Massachusetts passed an order appointing commissioners, to meet commissioners to be appointed by Rhode Island to run the line according to the agreement of January 19th, 1710. Certain other proceedings on the part of Massachusetts took place, preparatory to the proceedings of the commissioners; and on the 17th June, 1717, the general assembly of the colony of Rhode Island and Providence Plantations passed an act, appointing commissioners on the part of Rhode Island, for the final settlement of the boundary line with the commissioners named and appointed by Massachusetts. On or about the 22d of October, 1718, the commissioners met, and then made an agreement, which was signed, sealed, executed, and delivered by them, by which it was stipulated and declared: "That the stake set up by Nathaniel Woodword and Solomon Saffrey, in the year one thousand six hundred and forty-two, upon Wrentham Plain, be the station or commencement to begin the line which shall divide between the two governments aforesaid, from which said stake the dividing line shall run, so as it may (at Connecticut river) be two miles and a half to the southward of a due west line, allowing the variation of the compass to be nine degrees, which said line shall forever be and remain to be the dividing line and boundary between the said governments, any former difference, controversy, claim, demand, or challenge whatsoever notwithstanding." And on the 29th day of the said October
*668 last aforesaid, the general assembly of the said colony of * Rhode Island and Providence Plantations accepted the agreement of the said commissioners, and caused the same to be duly recorded; and thereby ratified and confirmed the same.

The answer avers, that all this was done in good faith, and with a full and equal knowledge of all the circumstances by the respective parties; and that the same has never been annulled, rescinded, or abandoned; and the last agreement was in pursuance of the agreement of 1709. Afterwards, on the 14th May, 1719, the commissioners on the part of Massachusetts and Rhode Island, signed a report, return, and statement of their proceedings, under the designation of "The subscribers, being of the committee appointed and empowered by the governments of the province of Massachusetts Bay and the colony of Rhode Island and Providence Plantations, for settling the east and west line between the said governments;" stating that they had met at the stake of Nathaniel Woodword and Solomon Saffrey, on Wrentham Plain, and had run the line, placing heaps of stones and marking trees to designate the same.

The defendant further alleges—"That the said report, return, or statement

was, afterwards, that is to say, on or about the 16th day of June, in the year of our Lord one thousand seven hundred and nineteen, approved by the general assembly of the said colony of Rhode Island and Providence Plantations;" and the defendant alleges, that from the date of the said agreements to the present time, the said commonwealth of Massachusetts has possessed and enjoyed all the territory, and exercised jurisdiction over the same, north of the said line, as prescribed in the said agreements of October, 1718, without hindrance or molestation; and the said defendant avers, that both the points of beginning agreed upon by said parties to said agreement, viz: the stake or station set up by the said Woodword and Saffrey, and the line run therefrom to Connecticut river, then were, ever since have been, and still are well known and notorious; that the whole boundary line fixed on by said agreement is precise, definite, and certain; and that the said defendant has occupied and exercised jurisdiction, and enjoyed all rights of sovereignty according to the same, from the date thereof to the present time.

The defendant pleads the agreement of 19th January, 1710, and the agreement in pursuance and confirmation thereof, of 22d October, 1717; and unmolested possession under the same from their date; in bar of the whole bill of the complainants; and prays judgment accordingly.

*669 * The answer and plea further aver, that the agreements stated were made and entered into with full knowledge of all the circumstances by both parties; that the same were a valid and effectual settlement of the matters in controversy; and were made and entered into without fraud or misrepresentation: and the station settled there has been notorious, and the line run therefrom has always been known, and its marks and memorials capable of being discerned and renewed.

Mr. Webster, of counsel for the state of Massahcusetts, moved to dismiss the bill filed by the state of Rhode Island, on the ground that the Court had no jurisdiction of the cause.

The motion was argued by Mr. Austin, the Attorney General of the State of Massachusetts, and by Mr. Webster, on the part of the state of Massachusetts; and by Mr. Hazard and Mr. Southard, for the state of Rhode Island.

Mr. Austin, in support of the motion:

This is an action by bill on the equity side of the Court, instituted by the state of Rhode Island against the state of Massachusetts.

The bill asserts the claim of Rhode Island to jurisdiction and sovereignty over a portion of territory, therein particularly described. The territory, so described, comprises between eighty and one hundred square miles, being a part of six townships, incorporated under the laws of Massachusetts, with a population of about five thousand persons, at present citizens of that state; and not less than five hundred thousand dollars of taxable property. But the bill makes no claim to any right of soil. It does not seek to disturb the title of the present possessors of the land, whose ancestors probably derived their title from the grants of the early government, in Massachusetts. It admits that the sovereignty and jurisdiction which it seeks to acquire, now is, and always, heretofore, from the first settlement of the country, have, in point of fact, been enjoyed and possessed, first by the colony, afterwards by the province of Massachusetts, and then

by the state of Massachusetts, at the declaration of American independence, at the adoption of the constitution of the United States, and uninterruptedly to the present time; but avers that the territory over which jurisdiction and sovereignty are now demanded for Rhode Island, was not included within the boundary of the ancient colony of Massachusetts, in 1642, but was contained in
*670 the * description of the limits of Rhode Island, as established by the charter of Charles the Second, made to her as a colony of Great Britain, in 1663; and by force of that charter, ought now rightfully to be enjoyed by her; but that Massachusetts wrongfully usurped jurisdiction and sovereignty over the territory thus claimed, and now possesses it, and has always possessed it without right.

The complainant therefore asks of this Court, that the northern boundary line between the complainant and the state of Massachusetts, may, by the order and decree of this honourable Court, be ascertained and established, and that the rights of jurisdiction and sovereignty of your complainant, may be restored and confirmed to the complainant; and your complainant may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; "and the title, jurisdiction and sovereignty of said state of Rhode Island be confirmed and established by the decree of this honourable Court, and that your complainant may have such other and further relief in the premises, as to this honourable Court shall seem meet, and consistent with equity and good conscience."

Among the allegations of the bill, it appears that a commission for the establishment of the partition line between the two colonies, was appointed by the respective local governments thereof; and that the commissioners on 19 January, 1710-11, agreed upon and established the line, as it now is, and always before had been known, possessed and established. But the complainant seeks for various causes, which are in the bill enumerated, to set aside this agreement and adjudication of commissioners, as null and void.

The respondent has filed a special plea in bar to the complainant's demand, grounded on the arbitration, award and settlement made by those commissioners; and a constant and uninterrupted possession under it for more than a century: and has answered in full all the allegations by which the complainant seeks to vacate this award. And the respondent well hoped it would have been the pleasure of Rhode Island to have discussed the merits and effect of this ancient adjudication; but when her learned counsel, under an order of this Court to answer the respondent's plea, filed a general replication, they accompanied the same with notice of an intention to move to withdraw the same; and have since intimated a desire to change and amend the tenor of the bill itself. To all this there would be no other objection but the inconvenience of delay, and the trouble
*671 * of keeping open a litigation so extensive in its operation. To bring the whole matter to a speedier issue, Massachusetts presents only a single point of her defence.

A motion is now made to dismiss the bill, for want of jurisdiction.

In establishing the government of the United States, the 3d article of the constitution, and second section, provides that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states &c.; in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.

Whether the subject of the present suit is a controversy between states,

within the meaning of the constitution; and whether, if it be so considered, a law of congress is necessary to the exercise of judicial power by this Court in the premises; and whether, if such law be necessary, any sufficient action has been had by congress to authorize judicial proceedings, are questions which, under this motion, are to be examined and decided.

In support of the motion to dismiss the bill, it is contended, that this Court has no jurisdiction over the present suit:

1. Because of the character of the respondent, independent of the nature of the suit.

2. Because of the nature of the suit, independent of the character of the respondent.

If the first of these propositions can be maintained, the result is, that in the present state of the law, this Court cannot entertain jurisdiction over a state of this Union, for any cause. If that may be doubtful, and the second proposition is established; it will result in this, that the subject matter of this suit, being for sovereignty and sovereign rights, is beyond the jurisdiction of a judicial court.

To the jurisdiction of a court of the United States in every case, two circumstances must concur. 1st, The party, or the subject of the suit, must be one to which the judicial power of the government extends, as that power is defined by the constitution; and, 2dly, There must be some rule of decision estab-
*672 lished by the supreme * power of the country, by the administration of which the right of the parties to the matter in controversy may be determined.

The government of the United States does not come by inheritance or succession, into any judicial power. In this respect, it is essentially different from all other governments known in the history of the world. Where a nation has been established by colony, or by conquest, there was a foundation in the institutions of the parent state, or the victors, on which its municipal establishments should be placed. Its own domestic arrangements, if it had any, remained, until changed by paramount authority. Such was the case with the states of this Union, when they ceased to be colonies. The government of the United States is a new government, beginning with the constitution. Although the confederation was its prototype, there was no general government, and certainly no national or federal judiciary, until the constitution had formed one.

The government of the United States may, therefore, exercise all, but no more than all, the judicial power provided for it by the constitution.

The third article of that instrument contains a declaration of the existence and extent of this new power.

It ascertains the parties, the causes, and the courts for judicial action. To a certain extent, it establishes the rule of decision; and, perhaps, this particular branch of the inquiry into the jurisdiction of the Court in this case, will depend on ascertaining how far the rule of decision is carried by the constitution; because, if the party and the controversy, and the rule for deciding the merits of the controversy are, by the constitution, given to this Court; there can be no impediment to its action in this particular.

It is admitted, that by the express words for the constitution the judicial power of the United States extends to controversies between two or more states. The party, therefore, may be within the operation of the judicial power; in case such a controversy as is contemplated by the constitution exists with one or more states.

Does the term controversies extend to all controversies?

It is to be observed, that the word "all," which is prefixed to the other classes of cases, is here omitted. The judicial power extends to all cases under the laws

of the United States; all cases under the treaties, made, &c.; all cases affecting ambassadors, &c.; all cases of maritime and admirality jurisdiction: but its phraseology is changed, and the universality limited by the omission of the *673 word "all," * when it relates to controversies to which the United States shall be a party, and to controversies between two or more states. The judicial power, then, does not reach to all possible controversies to which the United States shall be a party, or between two or more states.

What are the limitations? The first are those which are made by the character of the tribunal; and are included in the terms judicial power; and the words "law and equity," which precede the enumeration of the subject matters of judicial cognizance.

Although the government formed by the constitution, was a new government, and took nothing by succession or custom; the men who framed the constitution were educated to an intimate acquaintance with the judicial institutions of England; whose laws were, to a great degree, the foundation of our own, and whose language, when used by them in this relation, must be deemed to have a technical meaning.

A judicial power means, therefore, a power to interpret, and not to make, the laws; and the terms "law and equity," have reference to that complicated code of the mother country; extensive, but not universal, and limited in its operation by well settled decisions.

A limitation, on the broad terms of the grant, is necessarily implied in other branches of this power. The judicial power extends to controversies to which the United States shall be a party, and between a state and foreign states; but it would be manifestly absurd, to bring the political disputes of the day, nullification, abolition, slavery; and the controversies which are beginning to arise between states concerning them; to the decision of a jury trial in a court of law.

It is submitted, also, that controversies between states must be limited to those which begin with the states in that capacity, and does not extend to the antiquated controversies existing between the colonies, to which the states may or may not have succeeded, according to circumstances, which a judicial court can have no means to ascertain.

But the proper mode of considering this article of the constitution, in relation to the judicial power, is to take the constitution as a whole, and keep constantly in mind the grand design and intention of its framers; always regarding it as unique, original, and consistent with itself. The grand object of its framers was to establish a common government for sovereign states, and to have *674 that sovereignty * unimpaired, wherever it could so be left; without impairing the government of the Union. The judicial power of the United States is a power, in this view of the case, all or any part of which the government of the United States might exercise, through the appropriate department which was to be established.

It extends to such controversies between two or more states, as are properly within the decision of law and equity, in the precise sense of those terms, arising between the states, in virtue of their relation as states; and to be proceeded with and decided according to the customary forms or judicial proceedings, and the established doctrine of known and acknowledged laws. Every state, by virtue of its sovereignty, and every citizen of every state, by virtue of his allegiance to such state, stands absolved from the jurisdiction of the judicial power of the United States; until the government of the United States, putting into operation so much of the judicial power granted by the constitution as is necessary for the purpose, has organized a court, established the rules of decision, directed the

forms of its process, and designated the subjects for its cognizance; not exceeding, in any of these respects, the power assigned to it by the constitution itself.

If, therefore, there is no law regulating the intercourse between the states of the Union; there is no rule for settling a controversy that may arise between two or more states, by reason of such intercourse. If it then should be admitted that a law could be made binding the intercourse of states, and that one state might sue another state for a breach of such law; yet, until such a law exists, this Court can entertain no jurisdiction, because the state having a character above or beyond the existing law is not amenable to any superior; and the Court having no law to expound, cannot settle a judicial controversy, depending, as all such controversies do, on the question whether the conduct complained of, has, in the case presented, conformed to, or departed from the obligations which are imposed by law.

The positions, then, which, to carry out this doctrine, are next to be established, are: that the jurisdiction of this Court in any particular case, depends on some adequate legislative provision for the exercise of its powers under the constitution: and secondly, that in point of fact, no law is now in force which operates judicially on a state of this Union.

A legislative provision, it is contended, is necessary for two purposes;
*675 first, to regulate the form of process from the citation to the * judgment and execution, without which last, judicial action is a mere mockery; and secondly, to establish the law of the case, or the rule of action by which the conduct of the litigants is to be tried.

In regard to the last, which, as the most material, may be first considered, it is supposed that no doubt can exist as to the necessity of such law, as a prerequisite to judicial action. Judges are to expound the law, not to make it. The only pertinent question then is, does any existing law which this Court can recognise, act upon and regulate the intercourse between the states of this Union?

It is supposed that when a nation is established, and becomes by revolution or otherwise a member of the family of nations, it is, ipso facto, under the operation of international law. But not only does the doctrine of international law apply to the nation, and not to the states of our confederacy; but the law itself is not the subject of administration by judicial tribunals, when it operates on communities. Ambassadors are its counsellors; and its argument, the ultima ratio regum. If the principles of international law are made applicable to individuals in a judicial forum, it is because the municipal law of the place has incorporated the international law as a part of itself, and administers it by the force of domestic legislation. The constitution may itself establish a rule of decision. It does so, in the case of treaties, which are declared to be the supreme law of the land; and it provides that its own provisions shall be binding on judges in all the states. Whatever difficulties might be found in a judicial administration of the constitution or a treaty, between individual litigants claiming rights under them, without the aid of a law of congress; they may all be done away without touching this case; because nothing is claimed by the constitution or any treaty of the United States to show the right of the claimant in the present case, or bind the respondent to any prescribed course of action.

The necessity of a law of congress to establish, by direct enactment, or by implication, the code of the United States, has been admitted by this Court. Martin v. Hunter, 1 Wheat. 329. And it is supposed by the Court, in giving its opinion in that case, that congress was bound to vest in its courts all the judicial power of the government.

Congress has judged differently, because it has not appropriated all the judicial power of the government. But the question here, is not whether congress is

wrong in the omission, but whether, in a clear case of omission, this or
*676 any court of the United States can * supply the defect. In a very early period of the history of this Court, it was supposed that the states, like individuals, were amenable to its jurisdiction; and under that impression it was intimated in argument, and seemingly sustained by the majority of the Court, that the moment a Supreme Court is formed, it is to exercise all the judicial powers vested in it by the constitution, whether the legislature have prescribed methods for its doing so or not. Chrisholm's Ex'rs v. The State of Georgia, 2 Dall. 419; 1 Cond. Rep. 6.

The opinion of the Court was not unanimous; and Judge Iredell's dissenting opinion has become, by the 11th article of amendment of the constitution, the better authority. It is to be observed, that this amendment does not change the text of the constitution. That remains the same. The amendment declares that the judicial power shall not be deemed to extend to a case, which, by the construction of the court, it had in the above case been made to reach. It is further to be remarked, that all the subsequent proceedings of this Court in regard to states defendants, have, as far as they have proceeded, been fastened to this case. But the case being overruled by a higher tribunal than even this august Court, in a mode perfectly legal, it is submitted that no dictum, and no principle promulgated in it, can have the authority of law.

The necessity of a code of laws for the government of judicial action being apparent, congress has attempted to establish one. This is done, so far as it is done at all, by the judiciary act of 1789.

This statute adopts, in the 34th section, the laws of the states as a rule of action where they can apply. But as no law of Massachusetts or Rhode Island can embrace the respondent in this particular matter, there is by that section no rule prescribed for the present controversy.

It has been contended that the statute aforesaid, taken in connection with the constitution itself, established a code mixed and miscellaneous, made up of the common law and equity practice of Great Britain, modified by our particular institutions, which serves as the basis of judicial action. To a certain extent, this is undoubtedly so in many, if not all the old states; but to what extent it is true in regard to the United States, has been a debatable question, and is not yet definitely settled.

It is not necessary to settle it in this case; because, if the common law and chancery law of England are in operation here, in their utmost latitude and
*677 force, they do not reach the respondent. * The common law of England takes no jurisdiction over the actions of sovereign states; nor is there any power in chancery to hold jurisdiction over a sovereign, without his consent.

Such is the character of the states, respectively, of this Union. This proposition it is not intended to discuss. No man, who has at all studied the constitution of the country, can fail to have his mind made up on this point, on the one side or the other. It is maintained by the respondent, that every American state is a qualified sovereignty, and as such exempted by common law (meaning thereby, the whole judicial code of the country,) from judicial responsibility. It is not contended that a law may not be constitutionally made to reach a state. The question under discussion is, whether the present law extends to a state. The present law is what we term by eminence, and for distinction, the common law; and it is beyond all controversy, that the common law operates on subjects only, and not sovereigns; and upon property, and not sovereign rights.

If the constitution authorizes the government of the United States to subject a state to judicial process and judgment, the government of the United States may pass the laws necessary for the purpose. But to declare what may be done, is not to declare what is done. If congress, for any reason, has stopped short,

the judicial department is at the same point, brought to a stand. If it has adopted the common law, and nothing more, the Court can do no more than the common law warrants. If the common law does not extend its jurisdiction over a sovereignty, neither can the Court.

The doctrine contended for is that alone which prevents a suit against the United States by every individual who has a demand in dispute. The constitution is as unlimited in regard to the United States as the states. The judicial power extends to controversies to which the United States shall be a party. And in the earlier decisions of this Court, it is maintained that it is the same thing, as regards jurisdiction, whether the party designated the plaintiff or defendant. The state of Massachusetts, instead of soliciting congress for an adjustment of its claim, might have instituted a suit in this Court, obtained if it would a judgment, and levied its execution on a ship of the line, or the arsenals of the country.

The sovereignty of the United States, carried to its legitimate conse-
*678 quences, protects it from this extravagant absurdity. But * Chief Justice Jay, when, in his opinion in the Georgia Case he rode over state sovereignties, admitted that the logical conclusion of his argument involved a liability on the part of the United States to a suit at law. He avoids it, however, by the extraordinary suggestion that "in all cases against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to aid:" Georgia Case, 2 Dall. 478. What is this but an abandonment of duty through fear. It would have been better to adopt the maxim of the English lord chief justice: fiat justitia, ruat cœlum. The better answer is that by the law, as it stands, no action in a judicial court can be maintained against a sovereignty, whether state or national. That the constitution has, in both cases, authorized congress so to frame and pass laws that the judicial power may operate on the one and the other; but until that is done, any action of the judiciary would not be to expound the law of the case, but to make one.

But the United States are sometimes sued. This is in cases of contract, or other similar causes of action, in which the United States, dealing as a private citizen with other citizens, consents to come into a court of justice, and submit to the operation and construction of the laws of the land. The laws of the land reach to contracts. The United States makes a contract; and when it submits, by its own consent, to a suit, admits expressly, that in the decision the law of contract shall apply to its case. The United States makes a treaty; and by the constitution, a treaty is the law of the land. It claims for itself land under that treaty; takes possession, and cannot be ousted by a suit at law, in virtue of its sovereignty. But it waives its sovereignty, and submits its title under the treaty, to arbitrament by commissioners, or to a judicial decision in a court of law.

Have the states consented to be sued? Unquestionably the provision of the constitution is their consent to exactly what that provision contains; but the inquiry is not of consent, but construction.

Massachusetts does not propose to take herself out of the constitution, or to withdraw from any of its obligations. She admits, that under certain circumstances she has agreed to waive her sovereignty, and submit her con-
*679 troversies to judicial decision; but maintains, that * before she can be called upon to do this, a court must be established, a law made, or a code propounded, suitable to the decision of her case; and the forms of process, mode of proceeding, character of judgment, and means of enforcing it, be first established by legislative authority. But the United States never has submitted its sovereign rights, or its acts in its sovereign capacity, to judicial cognizance, and never can; and the states, as is contended, by agreement to submit their contro-

versies to judicial decrees, never intended to include in these controversies questions of sovereign right, for the regulation of which no law is made; and no law ever can be made by any other power than themselves, and each one for itself alone.

This view of the case is greatly fortified by considering the law which the complainant desires this Court to administer. This indeed may be deemed to belong to the merits of the case; and it does so. But it is also an appropriate subject of examination under the motion now submitted. One of the grounds of this motion is, that there is no existing law of the country binding on these parties, applicable to the controversy between them, which this Court can administer. This would be exceedingly obvious, if the complainant had presented his title under the bull of Pope Nicholas V., by which he divided all the countries to be discovered from Africa to India; or under Alexander VI., in which he divided three-quarters of the habitable globe: Omnes insulas et terras firmas inventus aut inveniendus, detectas et detegendas, &c.

The claim set forth in the bill is, in the judgment of the respondent's counsel, extra-judicial and untenable.

The state of Rhode Island states its claim to be thus: By the charter given to certain persons by Charles First, king of England, bearing date the 4th March, 1628, the colony of Massachusetts was established, with a territory bounded on the south by a line drawn within the space of three English miles, on the south part of the said river called Charles river, or of any or of every part thereof. That a charter was granted by Charles Second, on or about 8th July, 1663, establishing the colony of Rhode Island, by which its northern boundary was defined in these words: "on the north or northerly, by the aforesaid south or southerly line of Massachusetts Colony or Plantation." By these two charters, the boundaries of the two colonies were adjacent and conterminous.

That after the vacating of the colony charter of Massachusetts in
*680 * 1684, and the granting a province charter in 1691; which, so far as this matter is concerned, established the same conterminous boundary, by the same words; the government of Massachusets, about 1719, wrongfully possessed herself of a tract of land more southerly than a true line would be drawn, which should be run three miles south of the river called Charles river, or of any and every part thereof, "and extending the whole length of the north line of the colony of Rhode Island, being more than twenty miles in length and four miles and fifty-six rods in breadth, in the east end thereof, and more than five miles in breadth at the west end thereof, and has since continued wrongfully to exercise jurisdiction over the same."

From other parts of the complainant's statement, it is apparent that the true place for the dividing line was then admitted by both parties to be that described in the charter, and that it was drawn and the territory occupied by the province of Massachusetts on a claim of right; that the place of location was the place designated in the charter. The possession of Massachusetts, per fas aut nefas, from that time, is admitted.

The title of Rhode Island to the premises, admitting she is right in the construction of the charter, and the point from which the boundary line should be drawn (in which, at a proper time, it will be proved she is in great error,) depends on the validity of a grant by charter of the British crown, against an adverse possession of more than one hundred years; first by a province, and next by a state of the Union; through all the vicissitudes of war, revolution, and independence.

If, therefore, such a charter, admitting its existence, gives no title against an adverse possession; and especially, if the declaration of American independence, and the subsequent formation of a federal government, to be judicially

noticed by this Court, have vacated the law, or supposed law, on which the claimant rests its title, and this so plainly, that the charter cannot be inquired of by the Court, but that under the constitution it is bound by events subsequent to the declaration of independence, in all that respects states, because the states were thereby created; then, even under this motion to dismiss for want of jurisdiction, the bill must be dismissed.

Such is conceived to be the case. The state of Massachusetts makes no claim for herself; and admits none for Rhode Island, by force or virtue of any grant, charter, or authority from the British crown. Whatever might have
*681 been, in ancient times, the validity * of these instruments of royal power, they ceased, at the declaration of American independence, to have any judicial operation on the great corporations or colonies they had contributed to establish. Massachusetts, when she became a state became so in the integrity of her whole territory, as it was then possessed by her, whenever or however acquired, by grant, charter, purchase, treaty, or force of arms, claiming her actual possession as the ultimate evidence of right, and denying that there then existed, or yet exists, any human tribunal that can lawfully inquire how or by what means that possession was obtained; or that any authority exists to determine the limits of an original state of the Union, in any other way than by determining what it was, de facto, on the 4th July, 1776.

So far as regards Great Britain and other foreign nations, the treaty of peace in 1783, settled the exterior boundary of the United States; but in what proportions it was owned by the thirteen sovereignties, then commencing a political existence, was to be adjusted by themselves. This adjustment was a matter of agreement then to be made, or to rest on the fact of possession; which, admitting no higher title, and capable of no higher proof, assumed the right from the exercise of the right: and it would now be as wise to inquire how the seven Saxon kingdoms of Great Britain were established, or to define the limits of the heptarchy, as to attempt to decide what constitutes a state of the American Union, beyond the fact, that so it was, when the nation was proclaimed independent, or the confederacy was established under the constitution.

There have been many decisions in this Court, affirming the original validity of British grants of land, and of government. It is not proposed to set up any principle militating with these decisions. A careful examination of each of them, will show a distinction supporting the doctrine now contended for.

Discovery or conquest are, no doubt, well recognised titles, from which to deduce, ab origine, grants of land, and political government. But these titles carry with them, by their very terms, the idea of possession. The discoverer or the conqueror, is the only person in possession; and by force of his possession so acquired, he establishes a government, marks out a territory, or conveys title to the soil. The grant is a contract which the grantor cannot vacate; but it was never doubted, although the case has never come into judgment, that it might be surrendered or abandoned by the grantee. But a corporation, and much
*682 more a colony so established by the * right of conquest or discovery, is not a private, but a public, political institution.

To maintain that it was inviolable by the crown, was the doctrine of the patriots of the revolution; but to deny to them the power of abrogating, dissolving, annihilating it, is to bastardize the revolution itself. If the revolution did any thing, it was to cancel and annul these royal charters; and the same right of conquest, by which the king of England obtained power to make a political government here, gave to the states the right to destroy it.

In the Dartmouth College case, Wheaton's reports, the only important question was, whether the corporation then in question, was a public or private cor-

poration. It was admitted that, in the former case, it was repealable by the state. That a colony was a public institution, and partaking the character of a corporation, is undeniable. Indeed, Massachusetts was summoned into chancery as a public corporation, in the year 1684, and judgment rendered to vacate and annul her charter. But the revolution, the declaration of independence, the formation of the constitution of the United States, are acts of higher authority than the decree of the lord chancellor. They dissolved the government of the colony and the colony itself.

The people thereafter claimed and possessed the country by a new title. Sovereign rights were assumed by the states, in their character of public communities, claiming the right of self-government over the soil then in their actual possession; and the territory now claimed by Rhode Island, whatever it was before, then was, in fact and by possession, an integral part of Massachusetts. It was the state, as much as Boston or Salem. All other titles merged, and the charter was at an end.

Neither can the state of Rhode Island claim any thing by virtue of a charter granted to the colony of Rhode Island, by the English crown. Rhode Island, by her own act of independence, vacated that charter, and remitted herself to her better title of possession, by which she now holds the towns of Bristol, Warner, Barrington, Somerset, Little Compton, Tiverton, and the fine lands of Mount Hope and Poppy Squash; a territory almost half her actual extent, and unquestionably belonging to Massachusetts, as part of the original colony of Plymouth, which was united in one colony, Massachusetts, in 1691. Baylie's Plymouth, part 4, p. 50; Morton's Memorial 480. For the impossibility of being
*683 governed by the charters, see * Bancroft's Hist. of U. S. 83, 84, 137, 138, 209, 210, 309, 313, 364; Mass. Hist. Soc. 1st vol. 205, 412, 442, 396; 2d vol. 244.

Some questions may be proposed on this subject relating to the rights of the complainant under its assumed title, and the supposed obligations to the respondent, which must be answered before this cause can proceed to hearing and judgment.

Can a sovereign state be sued for acts done in virtue of, or by claim of right in its sovereign capacity? If Massachusetts had marched across the border supposed by Rhode Island to be the true line, and, in a belligerant attitude, taken possession of the disputed territory; is such act within the cognizance of this court, subjecting the state to action of trespass, quare clausum fregit?

If such suit is maintainable, by what law is the action of the Court to be regulated in cases where the constitution lays down no rule of proceeding, where the subject is not within the scope of any treaty, and is not defined by any statute law of congress?

If a state may be made amenable to a judicial court, is she to be answerable for the acts of a colony to which she has succeeded?

If she is suable, has the state sued, the common rights of other defendants, to plead accord and satisfaction, arbitrament and award, title by prescription, or the bar of any statute or common law limitations?

If a state takes all the estate and appurtenances of its colony ancestor, to whom it claims to succeed, is it what such colony had in possession when it ceased to exist; or may it lay claim to every thing to which such colony had a paper title, although disseised by the intrusion of some neighbouring state or colony?

If a state claims the rights of its colony ancestor, by what rule of what law are such rights to be ascertained?

If such rights are of real estate, will such estate pass to the colony in the first instance by deed only, or by livery of seisin?

If the suit is for sovereignty or sovereign rights, is there any title to such claim but possession?

If, in the case of the South American provinces, the United States delayed to acknowledge their independence and nationality, so long as there was a contest about it, and the possession was not secured; and if such be the principle of the law of nations, is not the same doctrine to prevail whether this sovereignty is claimed for the whole territory, or for a part of the whole?

But the more significant question remains. Can the allegiance of
*684 * five thousand American citizens, natives of Massachusetts, and owing her the duties of citizens, or of one such, be changed by a decree of this Court; without their consent, without notice to them to agree or disagree, as if they were serfs on the soil of Russia: because one hundred and twenty years ago, the prodigal monarch of England put his signature to a piece of parchment, to gratify the avarice or the ambition of his courtiers?

The want of jurisdiction is further maintained, by considerations applicable to this matter, arising both before and subsequent to the decision of the controversy on its supposed merits.

The merits of any case depends on the conformity of a party's conduct to a previously prescribed rule of law; but, if there be no such rule, there can be no test of such merit, and no decision upon them. But, in addition to this, a question arises on the form of process. By what rule of law can a state be brought before this Court, and by what form of execution, known to the laws, can the judgment of this Court be carried into effect?

It is undeniable that the power to direct the process, to declare its nature and effect, and the mode in which the judgment of the Court shall be executed, must be prescribed by the legislative department.

This may be done, possibly, by implication or reasonable inference. It is certain, no such provision is made by direct enactment. In the case of New Jersey v. New York, 3 Peters, 461, 4 Peters, 284, where this matter has been considered; it is admitted, that there is no direct provision of law, but the power to summons is made to rest on an analogy to individual suitors. That of execution is not at all considered by the Court.

Now, it is contended, that the original analogy that was supposed to exist between sovereign states and private citizens, never did exist. The 11th article of Amendments to the Constitution has so declared. Before that amendment, and under the broad extent of power erroneously assumed by this Court, a state was, indeed, but in the character of a private corporation; and it might well be thought, on that hypothesis, that the power to try a party by a known rule of law, involved the necessity of having the right to bring such party into Court for trial and judgment; and that such power, as it extended to reach other suitors might also reach states, between whom and other suitors, as the Court construed the constitution, there was no difference. In the opinion of the dissenting
*685 * judge, there was a difference; and when the 11th amendment altered the constitution, so that, to a great extent, this difference is established, the consequence seems legitimately to follow, according to the doctrines maintained by the dissentient.

It is now true that states were once deemed mere ordinary suitors, and that the general provisions of the process act, reached states as other suitors, because there was not recognised to be any difference among them. The process act reached only ordinary suitors. States are not now ordinary suitors, and the process acts reaching only to ordinary suitors, do not reach them.

The power of the courts of the United States, to issue writs not specially

provided for, is limited. They are confined to such as are conformable to the principles and usages of law. Judiciary act of 1789.

There are no principles of law, meaning the common law, or the statutes of the states, or of congress, that embrace a sovereign state. There is no usage in such cases. On the contrary, the usage is directly adverse. It holds to the exemption of such parties.

This difficulty occurred to the complainants. In 1830, the senator from Rhode Island, who signed the bill as solicitor, in 1832, introduced into the senate a bill, with minute provisions to remedy the defect. It did not pass. In 1828, the senators of New Jersey introduced a like bill to prepare for the controversy of that state with New York. It was not adopted. Every legislator who has been called to consider this subject, has admitted the defect of legislation.

2. This Court has no jurisdiction, because of the nature of the suit. It is in its character, political; in the highest degree, political; brought by a sovereign, in that avowed character, for the restitution of sovereignty. The judicial power of the government of the United States, extends, by the constitution, only to cases of law and equity. The terms have relation to English jurisprudence. Suits of the present kind, are not of the class belonging to law or equity, as administered in England. 1 Black. Com. 230, 231; Nabob of the Carnatic v. East India Company, 3 Vesey, 424; Barclay v. Russel, 1 Vesey, sr., 444; Penn v. Baltimore; 2 Ves. jr. 56; where the agreement, and not the political right, was the subject of litigation. See Lord Hardwicke's opinion; New York v. Connecticut, 4 Dall. 4. By the judiciary act of 1789, the jurisdiction of the Supreme Court of the United States, where a state is a party, is confined to cases "of a civil nature."

*686 * This qualification was not in contradistinction to criminal cases, for no state could be prosecuted by another state, as a criminal. It is intended to have reference to cases not political, or involving questions of sovereign power between states. Wiscart v. Dauchy, 2 Dall. 325. See, also, Drafts of the Constitution, printed for the members of the convention, and for their use only, and the successive amendments made, and in manuscript, on said printed drafts; in the collection of the Massachusetts Historical Society.

The complainant has no equity on his own declaration. It is a stale demand, in the language of the books; and the fact appearing on the face of the bill, need not be pleaded. Beckford et al. v. Wade, 17 Vesey, jr.; Story on Equity, sec. 1520, and the Notes; Middlecott v. O'Donnell, 1 Ball & Beatey, 166; Hoveden v. Lord Annersley, 2 Scho. & Lefroy; Paul v. M'Namara, 14 Vesey, jr., 91; Gifford v. Hart, 1 Scho. & Lefroy, 406. The court will not permit a party to lay by and wait until the subject of dispute has acquired great value, and become connected with great interests and diversified relations.

Again: if the parties are to be treated in this Court as individuals, or private corporations, or even as states with only the rights of private litigants, then the bill must be dismissed; because, if it seeks an adjustment of boundaries, without claim to the soil; such a cause is no subject of equity jurisdiction. Atkins v. Hatton, 2 Anstruther, 386; Tenhan v. Herbet, 2 Atkyns, 484; Welby v. Duke of Rutland, 2 Atkyns, 391; Willer v. Smeaton, 1 Bro. Ch. Rep. 572; Bishop of Ely v. Kenrick, Bunbury, 322.

There is no such case in this country, nor in England, for jurisdiction only between towns and countries.

If the boundary is ascertained, and the defendant has encroached upon the complainant, the right between individuals must be ascertained in an action at common law, and not by bill in chancery; and the right must, in all cases, be settled at law, before chancery can adjust the boundaries. See the cases above cited.

The only title, in equity, to which the complainant can appeal, is that by which an equity is administered, not applied to agreements generally, but intended to preserve family honour and family peace. Let this be applied to the sister states, in the great American family of the nation. It will leave undisturbed and unchanged, what has so remained for more than a century. Storkley v. Storkley, 1 Ves. & B. 30.

*687 * Hazard, for the state of Rhode Island:

The merits of this motion, sir, might have been more satisfactorily examined and discussed by the complainant's counsel, if we could have had the motion, and the specific grounds of it, put into writing, as we were desirous, and requested that they should be; but without effect.

It does appear to me, that a motion which goes to cut off one of the most important branches of the jurisdiction of the Supreme Court, exercised by it from its first establishment, and to deprive a party in court of the benefit of that jurisdiction, and of her only remedy for aggravated injuries, (as she has a right to insist in resisting a motion which would deprive her of a hearing,) that such a motion, and the specific grounds of it, ought to be presented in writing, with precision and fullness, and with adequate notice of them to the opposite party, to enable him to meet them, and to know what he has to meet. But we are now to answer this motion, verbally made, and to seek for the grounds of it, as they are scattered through a long and desultory argument; in the course of which, those grounds have taken so many different shapes, that it is not easy to recognise them for the same, or to reconcile them one with another. This being the case it is not surprising, that the counsel refused to put the specific grounds of their motion into writing. I have, however, endeavoured to make myself acquainted with the real question to be decided; and, with permission, will now present such views as I have been able to take of it.

Has this Court jurisdiction over the subject matter of, and over the parties to, the bill in equity now pending before it? and has the Court now power to proceed to the hearing and trial of the cause, and to make a final decree therein? If neither branch of this question can be answered in the negative, there can be no good grounds for the present motion; however those grounds may be shifted, or multiplied, or repeated. Allow me to consider the first branch of the question. It is evidently purely a constitutional question, arising under the constitution, and only to be tried and settled by it. Turning, then, to the constitution, we find it there declared, that the judicial power shall extend "to controversies between two or more states;" and that in those cases "in which a state shall be a party, the Supreme Court shall have original jurisdiction." These are the words of the constitution; and this is a controversy between two states; and the state of
*688 Massachusetts is a party to it: * and the state of Rhode Island is a party to it: and this controversy is now pending before the Supreme Court. But it is contended by the counsel, that although the words of the constitution do embrace this controversy, yet it is not within the meaning and intention of that instrument; and that it was the intention of its framers to exclude such controversies from the jurisdiction of the Court. This is dealing with the constitution as Peter, Martin and Jack dealt with their father's will. But as it is the only pretension that could be set up against the constitutional jurisdiction of this Court, it is important for us to inquire, strictly, what was the meaning and intent of the framers of the constitution, in this respect? And here, fortunately, nothing is left to conjecture or tradition. The explicit, unequivocal intention of the framers of the constitution upon this subject, is matter of authentic public record.

I beg leave to trace this constitutional provision for preserving harmony

among the states, from its origin. Before the revolution, all controversies between the colonies or provinces, concerning boundaries, were carried up to the king, in council, and were by him settled. There was one such controversy between these same parties, Massachusetts and Rhode Island; and another between Massachusetts and New Hampshire; both of which were so settled. When the states asserted their independence, that tribunal, of course, was annulled. But the new states felt the necessity of immediately establishing, in its place, a competent tribunal of their own, with full jurisdiction over those dangerous controversies. And this they did in the articles of confederation; the ninth article of which, provides, that "congress shall be the last resort, on appeal, in all disputes and differences now subsisting, or which may hereafter arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever." Congress to appoint judges to constitute a court for hearing and determining those causes. "And the judgment and sentence of the court to be appointed in the manner before described, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall, in like manner, be final and decisive; the judgment or sentence, and other proceedings being, in either case, transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned."

And congress did, accordingly, establish and organize the court, called the
*689 "court of appeals." * And that court took cognizance of, and decided a number of jurisdictional controversies between states; and among others, one in which Massachusetts herself was a party, and acknowledged the jurisdiction of the court, and submitted to its decision. It must be recollected, that the territorial descriptions and boundaries, contained in the colonial grants and charters, were necessarily loose and defective; and that in the progress of the settlements, in adjoining colonies, controversies must unavoidably arise as to their respective limits. And the greater the certainty of such conflicts, the greater was the necessity of providing an impartial tribunal for the peaceable adjustment of them. The language of the ninth article, just read, is descriptive of the state of things at the time: "disputes and differences now subsisting, or that may hereafter arise between two or more states, concerning boundary, jurisdiction," &c.

The court of appeals retained and exercised its jurisdiction over these controversies, until the adoption of the present constitution; when its place was supplied, and the exigency provided for by the establishment of a national judiciary, with full jurisdiction over the same controversies. And, by the twelfth section of the "act for regulating processes," &c., passed in 1792, it was enacted, "that all the records and proceedings of the court of appeals, heretofore appointed, previous to the adoption of the present constitution, shall be deposited in the office of the clerk of the Supreme Court of the United States, who is hereby authorized and directed to give copies of all such records and proceedings, to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said court are, by law, directed to be given; which copies shall have like faith and credit as all other proceedings of said court."

The counsel of Massachusetts have expressed the idea that the United States came into existence with the present constitution; and that Massachusetts, as one of them, is bound by nothing before that date. This is a strange conception, indeed. Not only the states severally, but the United States, came into existence with the declaration of independence; and the first of the articles of confederation ordains, that "the style of this confederacy shall be 'The United States of America.'" It was to "form a more perfect union," and to strengthen the confederation, that the convention was called which formed this constitution. And here are the concluding words of the resolution of the old congress of 1787,

*690 recommending * the call of the convention: "For the sole and express purpose of revising the articles of confederation," &c. The convention met; and in revising the important ninth article, changed the words "disputes and differences," to the word "controversies," taking the words "between two or more states," as they found them in the article. The tribunal was, of course, changed; for now an independent judicial department was established, which had no existence under the confederation. Not deeming it proper, in a permanent constitution, to designate particular, existing, and (it might be hoped) temporary disputes between states, they used the comprehensive word "controversies," as fully including them all. We do not know that there were any other controversies at the time, between states, than those about boundary; and if they were, they must have been comparatively unimportant; none other were so likely to exist or to be carried to extremities; and, therefore, the article, after the words, boundary and jurisdiction, merely adds the general expression, "or any other cause whatever;" apparently by way of precaution. The delegates from the several states knew that a number of those state controversies then still existed, and that more might arise; and they were fully sensible how all-important it was to provide against their breaking out. The great object of the convention was (as expressed in the preamble to the constitution,) "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." And how was union to exist? How domestic tranquillity, amidst contention among the members? How was justice to be established, if the strong were permitted to give law to the weak? and how were the rights of individual states to be preserved, if left unprotected from the encroachments of stronger neighbours? And what would become of the harmony and integrity of the Union, if all its members were not protected in the enjoyment of their equal rights?

But, in addition to all this, it is a remarkable fact, that this very question of jurisdiction, which Massachusetts now brings up, after the lapse of more than half a century, was directly acted upon and decided by the convention itself; as appears from the records of its proceedings. During its deliberations, the question was distinctly brought up, whether controversies between states, concerning jurisdiction and boundaries, should not be excluded from the jurisdiction of the *691 courts. And the convention decided that they should not be * excluded. And the provision in the constitution, as it then was and still is, was retained; and this constitution was unanimously agreed to by all the delegates. And, afterwards, the same question was discussed in the state conventions, and this provision was still retained and approved of; and the constitution ratified by every state. And several years afterwards, when the eleventh amendment to the constitution was adopted, and suits "against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," were excluded from the jurisdiction of the courts, the remainder of the provision, giving jurisdiction over controversies between two or more states, was preserved untouched; and the states thereby manifested their continued approbation of that provision; and, accordingly, this question of jurisdiction has long been settled in this Court, by its uniform practice and decisions, in numerous cases, from its earliest establishment.

And now, what is it that Massachusetts has to say to all this? I beg the Court to consider whether every single objection, and the whole argument on her part, have not been objections and arguments against the constitution itself rather than against the constitutional jurisdiction of the Court? In opposition to the constitution, they come armed with political axioms, and abstract theories of government; and with the aid of Montesquieu, and other learned writers, reason upon the science of government, and the distribution of appropriate powers among the three great departments.

Allow me, sir, to present a summary of the principal objections and positions upon which the counsel of Massachusetts appear most to rely. They lay it down, that a controversy between states, concerning jurisdiction and boundaries, is political, not judicial, in its character; that judicial courts can take cognizance only of controversies strictly judicial, not political, in their nature; that the present controversy concerns jurisdiction and sovereignty, and is therefore out of the judicial jurisdiction of this Court; and cannot be acted upon by it, without the assumption of political power. And, in support of their doctrine, the counsel have read a number of English cases, and the opinions of learned English chancellors. And what does it all amount to? Does it amount to any more than the plain, self-evident proposition, that courts created by sovereign power, and subordinate to it, cannot exercise jurisdiction over sovereign power, nor interfere with its prerogatives? Let us see if this is not the whole substance of the
*692 doctrine. In illustration of their * doctrine, the counsel have referred to the controversies between the colonies, concerning their boundaries, and over which the English courts exercised no jurisdiction. And why did they not? It was because there was a higher tribunal, which the colonies appealed to. The jurisdiction, in those cases, was in the king himself. He made the colonial grants, and gave the charters; reserving in them all allegiance and fealty to himself. He appointed the colonial governors; not excepting the governor of Massachusetts. Rhode Island almost alone, elected her own governors. He, the king, therefore claimed and exercised jurisdiction over the colonies, as their feudal lord. But, had he so pleased, he might have transferred his royal jurisdiction over those controversies, to any of his courts. And had he done so, those controversies, whatever their character, and by whatever name called, political or civil, would have become the proper subjects of judicial investigation and decision. Another case, much relied upon by the counsel of Massachusetts, was that of the Nabob of the Carnatic against the East India Company; of which case, the court of chancery declined taking jurisdiction, because one of the parties was a sovereign prince and the other (although subjects of the crown) acting by virtue of its charter as an independent state. It seems that in this instance, the charter of the company had placed it above the law. But suppose that its charter had subjected it to the jurisdiction of the court of equity, in any controversies it might have with any of the surrounding princes, would the character of the parties (the foreign prince assenting to the jurisdiction) or the nature of the controversy, have formed any obstacle to the exercise of that jurisdiction? And would not the exercise of it have been strictly judicial in its character? The same plain principles of exposition embrace and dispose of every case and instance which the counsel have brought or can bring in support of their doctrine. All these cases are governed by the peculiar institutions of England, and the structure of her government, in its various branches. No such question as this, of jurisdiction in controversies between two states of this Union, ever could arise in the English courts. If this jurisdiction is vested in the court, by the constitution, how preposterous is it to talk of the nature of the controversy, or the character of the parties! Suppose the controversy is political in its nature: what then?—Is there any reason in nature why it should not be subjected to judicial investigation and decision,
*693 as much as any other controversy? Suppose the parties to it are * two states: what then?—Is there any reason in nature why they should not be governed by the laws and principles of justice, as much as any other parties? All controversies, whatever their character and whoever the parties, if they are ever settled, and the parties will not settle them amicably, must be settled either by force or by the judgment of some tribunal. When the controversy is between sovereigns, the sword is the last resort, the "ultima ratio regum;" and the contest is waged at

the expense of the blood and lives of their subjects. But if the controversy is submitted to some independent tribunal; that tribunal, call it by whatever name we may, must act judicially. It is not in my power to perceive how the sovereignty of Massachusetts is concerned, as she alleges, in the settlement of the question. Even absolute sovereigns have submitted their controversies about territorial limits, to independent tribunals; and no one ever imagined that the sovereignty of either was affected by their doing so.

But Massachusetts is not now possessed of unlimited sovereignty. All the states, when they ceased to be colonies, became sovereign and independent. But they were all sensible that they could not remain so, if they remained disunited. They knew that it was by union alone they could preserve their liberties. They did unite; and, to secure their great object, they established this limited government of the Union, investing it with a portion of their state powers, and at the same time restricting themselves in the exercise of certain other powers. Thus, both the federal government and the state government are but limited governments; both equally bound by the constitution: and all acts of either, violating the constitution, are void. And it is the constitutional province and duty of the Court to declare such acts void, whenever the question of their constitutionality comes before it.

For in the formation of this federal republican system, an independent judicial department was deemed to be a necessary branch of the government, to prevent encroachments, and preserve a just equilibrium; and therefore, the constitution declares, that "the judicial power shall extend to all cases in law or equity arising under this constitution." And every decision of the Court upon the constitutionality of an act, either of congress or of a state legislature, concerns, to use the language of Massachusetts, their respective jurisdictions. How absurd, then, is it, to contend that the judicial power does not extend to political ques-
*694 tions, or to questions in which the jurisdiction * of a state is concerned.

The only question here is, whether the states, by the constitution which they formed and adopted, did confer this jurisdiction upon the Supreme Court. And is it not amply shown that they did confer it, and that they explicitly declared it to be their intention to confer it?

And is it for Massachusetts to gainsay this? Massachusetts possessed a larger share of sovereignty under the confederation than she does under the present constitution. Yet she then agreed and assisted in constituting the court of appeals, with full judicial powers over this very controversy; which was one of the then subsisting controversies concerning state boundaries and jurisdiction, specified in the 9th article. In the convention, also, which formed the present constitution, Massachusetts agreed to invest this Court with the same jurisdiction. And again, in her state convention, which ratified the constitution, she approved of and adopted this provision. And, during all this period of time, Massachusetts had subsisting controversies with her neighbour states, concerning her territorial boundaries and jurisdiction; particularly this controversy with Rhode Island, and another with the state of Connecticut, of precisely the same character; which last was not terminated until the year 1801. Massachusetts, therefore, by her own consent and acts, gave jurisdiction to this Court over the present controversy, so far as her consent and acts could give it.

Taking it, then, for granted, that it is fully shown that "this Court has jurisdiction over the subject matter of, and over the parties to, the bill in equity now pending before it," I will proceed to the consideration of the 2d question: "Has the Court now power to proceed to the hearing and trial of this cause, and to make a final decree thereon?"

Mr. Justice BARBOUR asked Mr. Hazard, if he could point out any process by which the Court could carry a final decree in the cause into effect, should it make one. For instance, if an application should be made by Rhode Island for process to quiet her in her possession, what process could the Court issue for that purpose?

Mr. Hazard said, that he had by no means overlooked that important question, but had given to it the fullest and most attentive consideration in his power.

But he had thought that it would be proper to reserve that question for the
*695 last to be considered; as in point of * order it appeared to be. At present, he was desirous of showing that the court had full power, and ought to proceed to the hearing, and to make a final decree in the cause.

And what is there to prevent this proceeding? The Court have jurisdiction over the subject matter and over the parties; and the parties are here before the Court The defendant state obeyed the subpœna issued from the Court, and came in more than three years ago; and took upon herself the defence of the suit and put in her plea and answer thereto. At another term, she applied to the Court for an order upon the complainant to reply; and at the last term, she made a written agreement with the complainant respecting amendments of the bill and pleadings; and she is now here in Court What is there to hinder the cause from proceeding?

Why, it is contended, in the first place, that consent of one party cannot give jurisdiction to the Court; and authorities have been read to this effect. No one doubts, that when it appears by the record or otherwise, that the Court has no jurisdiction of the subject matter of the complaint the consent of a party cannot confer jurisdiction. But when the Court has jurisdiction of the subject matter of the suit, the party defendant can consent to appear, and his appearance is conclusive upon him; even although if he had not appeared, he might not have been reached by the process of the Court. "The appearance of the defendants to a foreign attachment in a circuit court of the United States, in a circuit where they do not reside, is a waiver of all objections to the non-service of process on them." Pollard v. Dwight, 4 Cranch, 421. "An appearance by the defendant cures all antecedent irregularity of process." Knox v. Summers, 3 Cranch, 496.

But Massachusetts has raised a number of other obstacles to the Court's proceeding to a hearing of this cause. The following, I believe, contains the substance of them all:

They are 1. That the sole province of the Court is to expound and administer the law; and that here is no law for the Court to expound or administer. That congress has passed no act defining the controversy; no act prescribing the rule by which to try it; no rule of decision. 2. That by the 13th section of the judiciary act of 1789, congress has limited the jurisdiction of this Court, where a state is a party, to controversies of a civil nature; which this controversy is not, being political in its character; and that, therefore, congress meant to ex-
*696 clude controversies of this character from the * jurisdiction. 3. Congress has passed no act providing the process necessary to enable the Court to exercise its jurisdiction in the case. 4. That the Court possesses no power to carry a final decree in this cause into effect should it make one; congress, as is alleged, having made no law to enable it to do so.

The last of these objections, I will consider, presently, by itself. And as to the rest of them, if this doctrine is to prevail, what becomes of the jurisdiction expressly vested in the Supreme Court by the constitution itself; and what becomes of the Court itself, if it is to be placed upon the same footing as the inferior courts, which congress has power to establish, and of course, to regulate? By the 8th section, 1st article of the constitution, congress has power "to constitute tribunals inferior to the Supreme Court." But the Supreme Court was ordained

by the constitution itself, and necessarily possesses all the judicial powers incident to such a court. Otherwise the constitution might be defeated, and the Supreme Court rendered a nullity by the act of another and but co-ordinate branch of the government. But congress has no power to deprive this Court of its constitutional jurisdiction, nor to restrain it in the exercise of that jurisdiction. And this Court would declare unconstitutional and void any act of congress having such an object.

The case of Martin v. Hunter's Lessee, has been referred to, and much stress put upon some general remarks of Mr. Justice Story, who delivered the opinion of the Court in that case. Those remarks were concluded in the following words, which were not read, but ought to go with them: "We do not, however, place any implicit reliance upon the distinction which has been stated and endeavoured to be illustrated." But what shows conclusively that the counsel are wholly mistaken in their understanding of the meaning of those remarks, is the fact, that in the case of New Jersey v. New York, which was before this Court fifteen years after that of Martin v. Hunter, the Court, of which that hon. judge was one, not only took jurisdiction of the case, although the state of New York had refused to appear, but decreed and ordered, that the subpœna in this case having been returned executed sixty days before the return day thereof, and the defendant not appearing, the complainant be at liberty to proceed ex parte.

But it is wasting time, I fear, to dwell upon such objections, when it has been so clearly shown that these cases were expressly and intentionally included
*697 in the jurisdiction of this Court by the constitution. * I was quite at a loss to understand what was meant by "a rule of decision; a rule to try the case by;" until the counsel enlightened me by inquiring how, without an act of congress, the Court was to ascertain which state was right, and which wrong; alleging that, there being no such act, the Court could not proceed by the rule of the common law, or that of the civil law, or of any state law.

This is a novel idea. Such an idea was quite beyond the conception of the men who framed the articles of confederation. It did not enter into their heads that any thing more was necessary to be done, to meet the exigency, than to establish a competent Court, with sufficient powers to call the parties before them; and to try and determine these controversies in the same manner as they would any other controversies between any other parties. And it seems that the court of appeals, thus constituted, had the same idea of its province and duties, and found no difficulty in performing them; governing themselves by the principles and rules of justice, equity, and good conscience, and not dreaming that any different rule was furnished by the common law, or the civil law, or by any state law.

The 34th section of the judiciary act has been turned to again and again, as showing that congress had furnished a rule of decision, as it is called, in cases at common law; but no such rule for cases like the present. This is making a strange use of that short section of four lines, the whole purpose of which is to give efficacy to the local state laws, in trials at common law, in the courts of the United States, "in cases where they apply," says the section. That is, that cases arising under a local law shall be governed by that law. Thus, the state laws regulating the descent of real estates, or the rate of interest, for instance, ought, in all courts, to govern the cases arising under those laws. And this is the whole meaning of the section. The counsel have contended, that if any suit at all could have been instituted by Rhode Island, it ought to have been a suit at common law and not in equity. But no state law could apply to such a suit any more than to the present; and there are very many suits at common law which are not governed by any state law.

An expression (the word civil used in the 13th section of the same act is also suspected by the counsel of containing an important secret meaning, which

the counsel think they have discovered. They insist that by the use of this word "civil", congress intended to take this controversy, and all of the same
*698 kind, out of the jurisdiction of * this Court. Surely, the counsel of Massachusetts must feel themselves under the necessity of going a great way for inferences, and set a great value upon very slight ones, to draw them from such sources as these. The words relied upon, are "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party," &c. The plain object of congress was to withhold from the inferior courts jurisdiction in controversies between two or more states. And to do this, they gave to the Supreme Court exclusive jurisdiction in those cases, instead of original jurisdiction merely, which it had by the constitution. The word civil is properly used, because all controversies which do or can exist between two or more states, must be of a civil nature, and none other; unless they engage in war, which they have bound themselves by the constitution not to do. The word civil does not mean amicable or peaceable; actions of trespass and of ejectment are civil actions. Civil is technically and generally used in contradistinction to criminal. There is not the slightest ground for supposing that the word civil was intended to be used in contradictinction to political. Congress would never have taken so blind a way, so unintelligible and futile, to effect such an object as the counsel of Massachusetts wish to effect. Nor can any such distinction be made. If this is a political controversy, so is it a civil controversy. And if such a distinction could be forced upon the words, it would bring the section to this construction: that the Court is left to its original jurisdiction derived from the constitution, in this and other like controversies between states; but does not take exclusive jurisdiction of them, by virtue of this section of the judiciary act.

But, there is another word in the front part of this section, which, in its plain, common sense meaning, I think, is much more significant than the word which the counsel have endeavoured to render so cabalistic. And that is the word all—all controversies. This same word, used in another place, has been thought all-important, and great respect has been shown to it by the counsel of Massachusetts. By the constitution, "the judicial power shall extend to all cases in law and equity, arising under this constitution," "to all cases affecting ambassadors," &c. "to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states," &c. &c. And because the repetition of the word all is not kept up throughout the whole section, it is inferred that the constitution intended to
*699 confer * a less extensive jurisdiction in some of the cases enumerated than in others.

Now, congress, in framing the judiciary act, did not deal in such far-fetched inferences. Congress saw no such meaning in that section of the constitution; and therefore it declares in this same 13th section of the act, "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party." Congress did not intend to alter the constitution. It merely expressed what it understood to be the meaning of the section referred to. Now, although I have no quarrel with the word civil, I should not be willing to give the word all, in exchange for it. But, sir, why is it that so much effort is used to induce this Court to believe that congress is unfriendly to its jurisdiction over these cases? This is not very lawyer like, nor very respectful to the Court. This Court will look for its constitutional powers to the constitution itself; and will not allow any other department to construe that instrument for them. In many cases, this Court have accurately defined, not only its own constitutional powers and duties, but those of the other departments, legislative and executive, as by the constitution it is authorized and bound to do on proper occasions. And, let

me ask, if Congress possesses such power over the jurisdiction of this Court, why was it necessary for the states themselves to make the 11th amendment to the constitution, for the purpose of taking away the jurisdiction in suits "against one of the states by citizens of another state, or by citizens or subjects of a foreign state?" But, it is not true, that congress is unfriendly to this jurisdiction. There is no single instance in which congress has manifested such a disposition. On the contrary, in this same section of the judiciary act, we find it conferring exclusive jurisdiction, where, by the constitution, the Court had only original jurisdiction. And without any appearance of disapprobation, congress has seen this Court, from its earliest establishment, exercising its constitutional powers in these cases, and in others in which a state was a party; adopting its rules of practice and proceeding, and its general, permanent orders applicable to them; and prescribing its processes, and the service and return of them as occasion required.

The third objection is, that congress has provided no forms of process to enable the Court to exercise its jurisdiction. This objection, I should think, was reduced to a very small size. The writ of subpœna was issued, served and
*700 returned agreeably to the general order * of the Court. And the defendant state obeyed that process and appeared, took upon herself the defence of the suit; and I understood her counsel to say, that he should not urge any objection to this proceeding of the Court. And, if Massachusetts had refused to appear, the Court would have had it fully in its power to have proceeded in the cause, as it did in that of the state of New Jersey against New York. But Massachusetts has appeared, and is now in Court. What further process then is now wanting to enable the Court to proceed to the hearing of the cause. I know of none. Yet the counsel of Massachusetts still insist that the Court cannot go on a step without an act of congress. Let me then inquire: 1. What has been done by congress upon this subject? 2. What has been done by the Court?

1. A judiciary act was passed in 1789, at the first session of congress; and a process act at the same session, which, with many additions, was rendered permanent by a second process act, passed in 1792. The 13th section of the judiciary act, which gives exclusive jurisdiction to the Supreme Court in these cases, has already been read. The 14th section, enacts "that all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The 17th section enacts, "that all the beforementioned courts of the United States shall have power to make and establish all necessary rules for the ordinary conducting business in said courts, provided such rules are not repugnant to the laws of the United States." The process act, 1st section, enacts that "all writs and processes issuing from a Supreme Court, or a circuit court, shall bear test," &c. and "shall be signed by the clerk, and sealed with the seal of the court." The 2d section enacts, "that the forms of writs, executions and other process, their style and the forms and mode of proceeding in suits in those of common law, shall be," &c. "and in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient; or
*701 to such regulations as * the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or

district court concerning the same." The 18th, 24th and 25th sections of the judiciary act, first referred to, recognises the power of the Court to issue executions upon its judgments and decrees.

Thus much has been done by congress; and it is apparent that that department has always considered that every thing had been done, on its part, necessary to enable the courts to perform all their judicial duties; and fully to exercise all their judicial functions and powers. Congress saw that the courts were proceeding in the exercise of those powers without difficulty or impediment, and that no further legislative action was called for or needed. And so have the courts thought. In the case of Weyman v. Southard, 10 Wheat. 1, the Court considered itself possessed of full power over the whole proceedings in suits in equity, from their commencement to their final termination by satisfaction of the decrees or judgments.

It has been suggested by the defendant's counsel, that congress has omitted to provide for the exercise of this branch of the jurisdiction of the Court; because it did not intend that it should be exercised. This is impeaching the fidelity of congress to the constitution. But, fortunately, the imputation is wholly unfounded. It is alleged, also, that congress, by the judiciary act of 1789, has provided rules of proceeding in all, or nearly all the ordinary cases which can arise at common law, or in admiralty; but none in such cases as this. This is as palpable an error as could well be committed. In the case last mentioned, Weyman v. Southard, which was a case at common law, objections were made to the process, and to the service and execution of it; and it was contended that the proceedings were not authorized by any act of congress. But the Court, after remarking that the chancery power of the Court over all the proceedings in suits in equity, from their commencement to their final termination, were unquestionable, proceeded in these words: —"It would be difficult to assign a reason for the solicitude of congress to regulate all the proceedings of the Court, sitting as a court of equity, or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law." Thus we find, that while the equity powers of the Court in these cases is considered as having been placed beyond a doubt by the acts of congress, its parallel powers, in cases at common law, have required to be sustained by inferences and
*702 reasoning. * And it was decided in the last case referred to, and in that of the United States Bank v. Halstead, 10 Wheat. 54, that these powers are not legislative in their character. They must, then, be simply judicial in their character; and, if necessary, must be incident to the judicial powers and functions.

Let me now inquire what has been done by the Court in pursuance of its constitutional and legal powers. In 1791, the Court adopted the following general order: viz., "That this Court consider the practice of the court of king's bench, and of chancery, in England, as affording outlines for the practice of this Court; and that they will, from time to time, make such alterations therein as circumstances may render necessary." 1 Cond. Rep. 8. In 1796, the following permanent general orders, or rules, were established, viz: "1. Ordered that when process at common law, or in equity, shall issue against a state, the same shall be served upon the governor, or chief executive magistrate, and the attorney general of such state. 2. Ordered, that process of subpœna issuing out of this Court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process: And, farther, that if the defendant, on such service of the subpœna, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed ex parte." 3 Dall. 320; 1 Peter's Cond. Rep. 141. These several general orders, or rules, are still in full force, and have

been practised upon by the Court from the time of their adoption. Can there be a doubt that they are strictly in conformity to the constitution, and the acts of congress referred to? In the case of The State of New Jersey v. The State of New York, 5 Peters, in 1831, the Court remark, that "At a very early period of our judicial history, suits were instituted in this Court against states, and the question concerning its jurisdiction and mode of proceeding, were necessarily considered." The Court then proceed to review a number of the preceding cases which had been before it, in which a state was a party. "So early as August, 1792 (says the Chief Justice, who delivered the opinion of the Court,) an injunction was awarded, at the prayer of the state of Georgia; The State of Georgia v. Brailsford, 2 Dall. 402; to stay a sum of money recovered by Brailsford, a British subject, which was claimed by Georgia, under her acts of confiscation." This was an exercise of the original jurisdiction of the Court and no doubt of its propriety was ever considered.

*703 In February, 1793, the case of Oswald v. The State of New York * came on; 2 Dall. 402. This was a suit at common law. The state not appearing, on the return of the process, proclamation was made; and the following order entered by the Court: "Unless the state appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said state." At the same term, a like order was made in the case of Chisholm's Executors v. The State of Georgia; and at the next term, 1794, judgment was rendered in favour of the plaintiffs, and a writ of inquiry awarded. Grayson v. The State of Virginia, 1796, 3 Dall. 320; 1 Peters's Condensed Rep. 141. This was a bill in equity; and it was in this case that the Court adopted the two last general orders before mentioned. In Huger v. The State of South Carolina, the service of the subpœna having been proved, the Court determined that the complainant was at liberty to proceed ex parte. He accordingly moved for, and obtained commissions to take the examination of witnesses in several of the states. 3 Dall. 341; 1 Peters's Cond. Rep. 156. The Court also noticed the cases of Fowler et al. v. Lindsay; and Fowler v. Miller, 3 Dall. 411; 1 Peters's Cond. Rep. 189; and the case of The State of New York v. The State of Connecticut. 4 Dall. 1; 1 Peters's Cond. Rep. 203. "It has then," proceeds Chief Justice Marshall, "been settled by our predecessors, on great deliberation, that this Court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress. The rule respecting process, the persons on whom it is to be served, and the time of service, are fixed. The course of the Court, on the failure of the state to appear, after due service, has been also prescribed." And, accordingly, the Court did proceed, and made the order, the first part of which has already been read; and which order thus concludes: "And it is further ordered, that, unless the defendant, being served with a copy of this decree sixty days before the next ensuing August term of this Court, shall appear on the second day of the next January term thereof, and answer the bill of the complainant, this Court will proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill." But, before the cause came to a final decree, the state of New York compromised the controversy with the state of New Jersey, to the satisfaction of the latter state. The case now before the Court is the same, in character, and in all the principles involved in it, as that of New Jersey

*704 and New York. * Why should not the Court proceed in this case, as they decided to proceed in that; and in conformity to its subsisting rules and orders?

With permission of the Court, I will now proceed to consider the last objection which has been raised by Massachusetts to the jurisdiction of this Court;

and upon which she appears mainly to rely, for producing an effect upon the minds of the Court. That objection is, that should the Court make a final decree in the cause, it will have no power to carry it into effect.

When the clear and explicit provisions of the constitution are considered, and the several laws subsequently passed by congress, for the purpose of aiding in the fulfilment of those provisions, I cannot conceive how any doubt can exist of the power of this Court to carry into effect any decree, which by those provisions, it may be authorized and bound to make. And, if the constitution stood alone, I should still entertain the same opinion. It is a universal axiom, that the grant of a principal power, ipso facto, includes in it all the minor, subsidiary powers, necessary for the exercise of the main power, as incident to it. What a construction would it be to put upon the constitution, to say that the people, by that instrument, had ordained and established a tribunal to take cognizance of, and determine certain enumerated controversies, over which, for that purpose, they had given to it full and express jurisdiction; but that the tribunal so established could not perform its duty, for want of power to cause its decisions to be carried into effect? What would the people have a right to say to a tribunal which should render to them such an account of its services; or, rather, such an excuse for the neglect of its duty?

But is it not important here to inquire, whether, in considering the present question of jurisdiction of this Court to hear, try, and make a final decree in this cause, it can be at all necessary or useful to inquire what further powers the Court may, or may not, exercise upon any future, distinct application, which may or may not be hereafter made to the Court; and upon which new and distinct application, should any such be made, the Court will then decide as it shall deem right. If, by the constitution and existing laws, the Court have jurisdiction over this cause, to hear, try, and decide it; is it not bound to exercise that jurisdiction, when appealed to: and ought the Court to decline exercising this unquestioned jurisdiction, from an apprehension that possibly, it may hereafter, be asked to do something more, which, possibly, it may not have it
*705 in its power to * do? In the case of New Jersey and New York, the Court said, that, "inasmuch as no final decree has been pronounced, or judgment rendered in any suit heretofore instituted in this Court against a state; the question of proceeding to a final decree, will be considered as not conclusively settled, until the cause shall come on to be heard in chief." Thus the Court determined to hear the cause in chief, without anticipating what its final decree might be; much less, what, if any thing, might remain to be done, after the decree. And the Court did then decree, "that the complainant be at liberty to proceed ex parte;" and further decreed, that, "unless the defendant state appeared, the Court would proceed to hear the cause on the part of the complainant, and to decree on the matter of the said bill." There are many cases in which decrees in chancery cannot be fully, if at all, executed; but that has never been considered a reason why the Court should not pronounce the decree which it has the power to pronounce.

But, I shall not dwell longer upon these questions; because there is another position which, if sound, I think entirely obviates the objection of the want of power in the Court beyond the power of making a final decree in the cause.

That position is, that the pronouncing of a final decree in the cause will complete the exercise of all the jurisdiction which the cause can require; and will be a final, conclusive and permanent termination of the controversy. This position, upon much reflection, I believe to be sound or I certainly should not venture to advance it before this honourable Court; as I do, entirely upon my own responsibility, as to its soundness or unsoundness.

A final decree in this cause will have no resemblance to a judgment of Court for a sum of money to be collected on execution; nor to a judgment in ejectment to be followed by an execution for possession. No process would necessarily follow a final decree in this cause. We ask no damages of Massachusetts; no delivery of possession; no process to compel her to do or undo any thing. All we ask is a decree, ascertaining and settling the boundary line between the two states.

Mr. Justice THOMPSON asked Mr. Hazard if the bill did not contain a further prayer; a prayer that Rhode Island might be restored to her rights of jurisdiction and sovereignty over the territory in question; and quieted in her enjoy-
*706 ment of them? And, that part of * the bill being read, it appeared, that it did contain such a prayer, in addition to the prayer that the boundary line between the two states might be ascertained and established.

Mr. Hazard said that the latter part of the prayer of the bill had escaped him; but it did not vitiate the bill. The Court would have it in its power to grant so much of the prayer as they might think right. All Rhode Island asked for was a decree ascertaining and establishing the true boundary line between her and Massachusetts. When that is settled by a decree, the rights of jurisdiction and sovereignty will necessarily follow: the decree will execute itself; and this controversy can no longer exist. When the boundary line is settled, it will be the same as all other established boundary lines; and the relative situation of Rhode Island and Massachusetts will be the same as that of all other adjoining states.

And why should not Rhode Island be placed upon the same footing, in this respect, with her sister States? Why should her jurisdictional boundary line be left in dispute, and she exposed to encroachments; when all other controversies of this kind have been lastingly settled?

Am I not sustained in the position I have here taken, by the opinions and acts of the learned men who framed the articles of confederation? They enacted that the decrees of the court of appeals, in the cases over which jurisdiction was given to it, should be final and conclusive. And it was their opinion that nothing more than a final decree would be necessary; and, therefore, they provided for no further proceedings. And, what ought to be conclusive, is the fact, that although a number of decrees in such cases were made by the court of appeals; no difficulty was ever experienced, and no further process was ever found to be necessary.

It is true, that after the line is settled, Massachusetts may do other wrongs to Rhode Island for which other remedies may be necessary; and so she may to any other state: but this controversy about the line will be at an end. Should Massachusetts hereafter encroach upon Rhode Island, that will be a new aggression; the same as if she should encroach upon any other state, near or distant; the same as if she should encroach upon the state of New York, or Connecticut, or New Hampshire; or again, upon Rhode Island, on her eastern boundary: with all of which states Massachusetts has had controversies about her boundaries, and has always been found the aggressor. But when those boundaries were
*707 ascertained by the competent * tribunals, all difficulties were at an end.

When Rhode Island, upon the decision of the king in council, received under her jurisdiction, her county of Bristol, and her towns of Tiverton and Little Compton, over which Massachusetts had long exercised jurisdiction, she met with no obstructions from that state. Neither did New Hampshire, whose controversy with Massachusetts, was decided by the same tribunal. Still the Court are told by Massachusetts that they cannot carry their decree into effect. Allow me to ask, sir, in what possible way Massachusetts can have it in her power

to defeat or evade the effect of that decree? The decree itself, the moment it is pronounced, will establish a new state of things between Massachusetts and Rhode Island. And what are the means that Massachusetts can resort to, to prevent that decree from taking full effect by its own force and operation? I should be glad to hear the attorney general of Massachustte inform the Court, what it is that that important state is going to do to set the decree of this Court at defiance, and render it a nullity? Massachusetts is not going to erect a line of batteries along this strip of land; nor to station a military force there to take hostile possession of it. If she should, it would be invasion; an ample remedy for which is provided in the 4th article 4th section of the constitution. And Rhode Island would be under no necessity to apply to this Court for an injunction in such a case. And this again shows the meaning and propriety of the expression "civil controversies," used by congress; and, no doubt, meant by the constitution. I ask again, then, what can Massachusetts do to prevent a decree of this Court taking full effect by its own force and operation? She can do nothing. She can only say that she will retain jurisdiction over this district, the decree notwithstanding. But let us examine what she can make this amount to. Massachusetts, as a state, is not the proprietor of this strip of land. If she own any land there she will, of course, still own and retain it; and her right and title will be held as sacred as those of any other owners of the soil. There is no shire town within this district; and of course, probably, no public buildings belonging to the state. If there are, they will still be her property, though not appropriated to the same uses. There will be nothing, therefore, which Massachusetts can retain the possession of, which she will be required to relinquish. Jurisdiction over the district it will be out of her power to exercise, for she will not have it; that (in her) will be extinguished by the decree, ipso facto. What
*708 jurisdiction, after the decree, can * she exercise? She cannot number the inhabitants of this district as part of her population, or of her militia; for they will not be so any more than the inhabitants of the county of Providence. And, no more can she tax them, or their lands, or other property; for they will not be subject to her laws. Her tax-gatherers can collect no taxes; her ministerial officers execute no process within that district, for it will be out of the jurisdiction of their state. And, should they attempt to do so, they will carry no Massachusetts authority with them over the boundary line established by the decree of this Court. They will be trespassers; and subject themselves to the penalties provided for the punishment of trespassers. With as much right might Massachusetts send her officers into any other part of the state as this; but the civil authorities of Rhode Island would have no difficulty in dealing with such offenders. They would be violators of the law of the land; not only of the laws of Rhode Island, but of the constitution of the United States, and of the acts of congress, under the authority of which the decree of this Court would have been made. They could not escape conviction and punishment. And any countenance Massachusetts might give to them would but aggravate the offence and the punishment. No aid from this Court would be needed. The existing laws would furnish a perfect remedy for the wrongs attempted to be done.

Those Massachusetts' officers, sheriff, tax-gatherers, or whatever they might be, would have no authority to demand aid from the people of the adjoining county in Massachusetts. Nor is it probable that any of those people, (not being bound to obey such demand,) would have any concern in violating the rights of another state, established by a decree of the Supreme Court of the Union. But should those officers, on any occasion, carry with them a sufficient body of men from Massachusetts, to enable them, for the time, to seize upon the property or persons of any of the inhabitants of the state of Rhode Island; (of which this district would then be a part;) and to escape into Massachusetts before they

could be arrested, they would all alike be criminals, and punishable as such. And, by the fourth article, second section of the constitution of the United States, and that of congress passed in conformity thereto, the executive authority of the state of Massachusetts, on demand made by the executive authority of the state of Rhode Island, would be bound and compelled to deliver up those criminals to be removed for trial to the state having jurisdiction of the crime. And
*709 here again Rhode * Island would have a perfect remedy without the interposition of this Court. Nor would Massachusetts have it in her power, effectually, to obstruct the magistrates and civil officers of Rhode Island in the execution of their official functions. Those magistrates and officers, in the performance of their lawful duties, within the jurisdiction, and under the authority of their own state, would have nothing to apprehend from any quarter. Should any of them be lawlessly seized, and carried within the jurisdiction of Massachusetts, still they would have nothing to apprehend. The decree of this Court, the laws of the state in which they acted, and the constitution and laws of the United States, would sustain and save them harmless. These authorities, the respectable judicial tribunals of Massachusetts, would not set at defiance; and if they should, their judgments and proceedings would speedily be revised and corrected here.

Thus, we find that it would be wholly out of the power of Massachusetts, to prevent a final decree of this Court from taking full effect, by its own force and operation.

I could not help feeling great surprise, when I heard the attorney general of Massachusetts so solemnly and portentously warning this Court of consequences, and expressing his anxious hopes, that if it should decide against Massachusetts, it will, for the honour of the court, and for the honour of the country, be sure to find some way to execute its decree. What! Does Massachusetts threaten? Is Massachusetts ready to become a nullifying state? and to set up her own will, in defiance of the decrees of this Court, and of the constitution itself? This Court will not make a decree against Massachusetts, unless it shall be satisfied that the constitution authorizes it, and that equity requires it. And for Massachusetts to expect to prevent the Court from making such a decree as it may deem constitutional and equitable, by telling the Court how formidable she is, and how contumacious and lawless she means to be in her defiance of its decrees; this, it appears to me, is almost as deficient in policy, as it is in modesty. But let Massachusetts take her own course, and whatever that may be, it will excite no apprehension in Rhode Island; although she may grieve that so noble a state should conduct in such a manner as to tarnish her high and well merited renown.

If, sir, the principles and positions I have endeavoured to establish are sound, and have been established, I must think that they reach and dispose of all the material objections which the counsel of Massachusetts has raised against the jurisdiction of this Court.

*710 * There were a great number of other objections, or suggestions and statements made by the counsel, some of which I will now just advert to; although I do not consider them as having any bearing upon the question before the Court.

It is alleged that the five thousand inhabitants of the district in question, (I know not how many there are,) have a right to be parties to this suit, and are not. If this was so, it would be no objection to the jurisdiction of the Court. The Court would take care that they were made parties before it proceeded further. But all the proper parties are here in Court. This controversy is about state jurisdiction, not titles to soil and freehold. I suspect, however, that if those inhabitants were consulted, they would not consent to be made defendants; but would rather join with the complainant state. They are taxed hard in Massachu-

setts, and would have no state taxes to pay in Rhode Island. And, at one time, a very large number of the respectable inhabitants of that district, petitioned the legislature of the state of Rhode Island to be received into that jurisdiction, to which they claimed rightfully to belong.

It is objected, also, 1. That the bill contains matter in bar to itself. 2. That the bill admits that Rhode Island was never in possession, and that the suit is barred by prescription. 3. That the controversy has been settled. They might be proper matters for discussion and proof (they are not proved yet, and cannot be, for not one of them is true,) upon the trial of the cause; but, evidently, have nothing to do with the question of jurisdiction. Because it appeared that the Massachusetts charter of 1628, upon a scire facias from the court of king's bench, was revoked and annulled in 1685; and that she did not get a new charter until 1691; her counsel has stated, that Rhode Island, while a colony, abandoned and surrendered up her charter. This is a mistake. Connecticut and Rhode Island never did surrender their charters; although they were demanded, and great efforts made to obtain possession of them. The Connecticut charter was hidden in the hollow of the venerable old oak tree at Hartford; and that of Rhode Island was also preserved secure from its enemies, and is now in her secretary's office at Providence. The counsel (in sport, I suppose) has indulged his fancy in describing Rhode Island as she would have been had the claims upon her territory, set up by Plymouth on the east, and Connecticut on the west, been successful. Very true; and Rhode Island would have been stripped indeed; especially with Massachusetts helping herself to five miles more of her *711 territory on the north, which I suppose the * attorney general of Massachusetts thinks was quite venial, while Rhode Island's territory was looked upon as free plunder. But those claims upon the territory of Rhode Island, on the east and west, were found and decided to be unjust. And it was Massachusetts herself, not Plymouth, which had gotten possession of the county and towns within the limits of Rhode Island, as beforementioned, and from which, after a faint struggle, she was compelled to retreat. There is no probability, that a small state will make unreasonable claims, much less encroachments upon large ones.

The counsel of Massachusetts have asked the Court to consider the character of the original colonial charters, and have read passages from Bancroft's History, to show how loose and defective those charters were, and how difficult it would now be to decide controversies growing out of them. That a case will be a difficult one to settle, is not a very good reason to offer for a court's not taking cognizance of it. But in the present case, no difficulty whatever can arise from such a source. The charters both of Rhode Island and Massachusetts are clear and intelligible in this particular. Rhode Island, by her charter, is bounded north by the south line of Massachusetts; and that line, by the Massachusetts charter, was to be three miles south of the most southerly part of Charles river; the sole question, therefore, to be settled, is a question of construction of that part of the Massachusetts charter. One set of the Massachusetts commissioners appointed to settle this line with Rhode Island, reported correctly to their legislature the construction which each state relied upon. The Rhode Island construction was, that the most southern part of Charles river proper—Charles river itself, that is, what was known by the name of "Charles river," was the point from which to measure off the three miles. On the other hand, Massachusetts insisted that the most southerly source or spring head of any run of water, running northerly and finding its way into Charles river, was to be taken as the most southerly part of Charles river. And accordingly, they found a brook, called Mill brook, which ran from the south into Charles river. This they traced up to a pond, called "Whiting's Pond," out of which the brook run; then going to the south end of the

pond, they found another brook, called Jack's Pasture brook, which they traced up south to its spring head, and this they called the most southerly part of Charles river. Surely there can be no difficulty in deciding by the charters, which of these constructions is the correct one. These are the merits of the case,
*712 * and I am sensible that they have no bearing upon the question of jurisdiction before the Court. But the counsel of Massachusetts have repeatedly introduced the merits; and I presume it is not improper for me to follow him so far as to state them correctly.

Precisely the same question was decided more than an hundred years ago, in the controversy between Massachusetts and New Hampshire. The northern boundary of Massachusetts is defined and limited in her charter, in the same terms as her southern boundary. She was to have three miles north of the most northerly part of the Merrimack river. Upon this she set up the same claim upon New Hampshire, as she now does upon Rhode Island; and by her construction, she would have taken the whole of New Hampshire, and the greater part of the province (now state) of Maine. But her pretensions were decided to be wholly unfounded and unjustifiable; and she was compelled to draw herself within her charter limits. And why has she not respected that decision, and contented herself with the same limits on the south as on the north?

Massachusetts, also, had precisely the same controversy with the state of Connecticut, about the westerly part of this same line; that state and Rhode Island, by their charters (granted about the same time, 1662–3) being both bounded northerly upon the same straight line, to be drawn due east and west throughout. But Connecticut would not submit to the encroachments of Massachusetts. And, although she had entered into a written agreement with her, establishing the line as it then was; and that agreement had been formally ratified and confirmed by the legislatures of both states, (which was never the case with us;) yet Connecticut proved, that misrepresentations and impositions had been practised upon her commissioners and government, in the running of that line; and she brought Massachusetts to a sense of justice, and obtained from her a large part, and not the whole of the territory which the latter had wrongfully taken within her limits. And now, whenever you look upon any map including the three states, or that part of them, you see the Connecticut northern line is miles in advance of that of Rhode Island, which ought to be a continuation of it; and the government of Massachusetts has not caused, and cannot cause any survey or map of that fine state to be taken or published; without recording anew and emblazoning her unjust encroachments upon Rhode Island.

A singular appeal was made to your honours, in the gentle tones of per-
*713 suasion by the counsel of Massachusetts. They remind the Court * that courts of equity do not countenance family quarrels, in which the honour and feelings of families may be exposed to injury. Very well. And here is the important state of Massachusetts, surrounded by six other states, all of which show her great respect and deference, and manifest a desire to continue in strict harmony with her. But Massachusetts is not satisfied with this. She encroaches, and encroaches upon her neighbours, until their patience is exhausted; and after long forbearance they are compelled, one after another, to complain of her aggressions and seek redress. And thus called upon, here comes Massachusetts quite undisturbed, and to smooth matters over, talks about family disputes, and family honour, and the relations between neighbouring sister states, which make it improper to listen to their trifling complaints against each other; and so she advises that the complainants be reprimanded and sent home. But this did not answer before the old tribunal of the king in council, nor before the American court of appeals. Rhode Island, the last of the injured states, whose grievances

alone remain unredressed, entertains a high respect for her elder sister, Massachusetts. But I take it upon myself, to assure this honourable Court, should it think itself bound in justice to make a decree in her favour, she will not be offended nor complain of it; although the decree must be against that respected elder sister.

Allow me to conclude my remarks more seriously, and with matter more important. The counsel of Massachusetts have talked much of the proper division of powers between the three great departments of government; the legislative, executive, and judicial. And they insist that the judicial is not the proper department to have cognizance of these controversies. Pray, have you heard them point out which of the other departments is the proper and appropriate one; or what other tribunal there is to exercise this jurisdiction? The idea of investing the executive with jurisdiction over controversies of any kind, whether political or civil, between states or individuals, has never entered into the head of any man. And is it not evident, that jurisdiction over such controversies cannot consistently be exercised by the legislative department of any well-balanced government? And, when the structure of the federal and state governments, relatively to each other, the partition, limitation, and adjustment of their respective powers, is considered, the incompatibility of such a legislative jurisdiction is still more glaring. And, therefore, the constitution of the United States has not per-
*714 mitted * the exercise of any such jurisdiction to either the legislative or executive department; but has expressly conferred it upon the judiciary, which is free from all the objections that lay against the other two. What then does Massachusetts mean? Does she mean, that in her controversies with any of her sister states, she is not amenable to justice, before any tribunal?—And that there is no remedy for an injured sister state, for any wrongs she may suffer at her hands? That there shall be no wrong without a remedy, is a first principle, an axiom in all free governments. Is this the country in which that great fundamental principle of right and justice is to be first abandoned?

Mr. Justice BALDWIN delivered the opinion of the Court:

At the January term of this Court, 1832, the plaintiff filed a bill in equity, presenting a case arising under the various charters from the crown of England to the Plymouth Company, in 1621; to Massachusetts in 1629; to Rhode Island in 1663; the new charter to Massachusetts in 1691; together with sundry intermediate proceedings of the council of Plymouth: the result of which was to vest in the colony of Massachusetts and the king, all the rights of propriety and government previously granted to that company as a political corporation. The bill also set out the repeal of the original charter of Massachusetts on a scire facias in the court of chancery in England, the grant by the crown and acceptance by the colony, of a new charter, subsequent to the charter to Rhode Island.

All these acts are especially and at large set out in the bill, but need not in this stage of the cause be referred to by the Court in detail. They present the claim of the plaintiff to the territory in controversy between the two states, in virtue of these charters, according to the boundaries therein described.

Independently of the claim under the charter of 1663, the plaintiff asserts a previous right in virtue of grants from the Indians, and settlements made under a title thus acquired; and also asserts, that under both titles, the inhabitants of Rhode Island made settlements on the lands immediately south of the boundary between the two colonies as now asserted; which settlements were so made and continued from the time of the purchase from the Indians, before, under the charter, and afterwards, though the line was not defined and disputed.

The bill then proceeds to state the existence of controversies between the two colonies, at a very early period; to settle which commissioners
*715 * were appointed by each colony in 1709, and at various other periods down to 1809; and sets forth the proceedings of the commissioners of the colonies before the revolution, and the states afterwards, down to 1818.

For the present purposes of this case, it is necessary to refer only to one subject matter of these proceedings during this whole period, which is presented in the bill in the same aspect throughout; that subject is the agreement of 1709 and 1718; and the acts done pursuant thereto, which are recited at large in the bill. It then states the agreement of the commissioners of the two colonies that a line should be run and marked as their boundary, which was done; a survey made and returned, together with all the proceedings to the legislatures of the respective colonies, accepted by Massachusetts, but as the bill avers, not accepted and ratified by Rhode Island. This is the line now claimed by Massachusetts; and whether the charter line or that, is the true line of right and boundary between the two states, is the only point in controversy in this case.

The bill avers that this line was agreed on in consequence of a representation by the Massachusetts' commissioners to those of Rhode Island, that in 1642, Woodword and Saffrey had ascertained the point three miles south of Charles river; which, by the charters of both colonies, was to form their common boundary by a line to run east and west therefrom. That Woodword and Saffrey had set up a stake at that point on Wrentham Plains, as the true southern boundary of Massachusetts. That the Rhode Island commissioners, confiding in such representation, believing that such point had been truly ascertained, and that such stake was no more than three miles from Charles river, south entered into and made the agreement of 1710–11, which was executed by the commissioners on both sides.

In the agreement is this clause: That the stake set up by Woodword and Saffrey, approved artists, in 1642, and since that often renewed, in lat. 41° 55′ N., being three English miles south of Charles river, in its southernmost part, agreeably to the letters patent to Massachusetts, be accounted and allowed as the commencement of the line between the colonies, and continued between them as decyphered in the plan of Woodword and Saffrey, on record in the Massachusetts government.

It is then averred in the bill, that no mark stake, or monument, then existed (1710–11), by which the place at which Woodword and Saffrey were
*716 alleged to have set up the stake could be ascertained; that * none of the parties to the agreement went to such place; that no survey was made, no line run, nor any means taken to ascertain where it was; whether it was three miles or more from Charles river; whether Woodword and Saffrey ever ran the line, or whether it was the true boundary line between the colonies, according to their respective charters. That Massachusetts took wrongful possession of the territory in question, in which Rhode Island never acquiesced, and to which she never agreed; but continued to assert her claim from the time of the agreement, to the filing of the bill, to all the territory embraced in her charter, and sovereignty and jurisdiction within and over it, as claimed in the bill. The bill denies that any line was ever run by Woodword and Saffrey, in 1642; avers that the agreements of 1710–11, which adopted it, were unfair, inequitable, executed under a misrepresentation and mistake as to material facts; that the line is not

run according to the charters of the colonies; that it is more than seven miles south of the southernmost part of Charles river; that the agreement was made without the assent of the king; that Massachusetts has continued to hold wrongful possession of the disputed territory, and prevents the exercise of the rightful jurisdiction and sovereignty of Rhode Island therein. The prayer of the bill is to ascertain and establish the northern boundary between the states, that the rights of sovereignty and jurisdiction be restored and confirmed to the plaintiffs, and they be quieted in the enjoyment thereof, and their title; and for other and further relief.

On the service of this bill on the governor and attorney general of Massachusetts, agreeably to a rule of this Court, the legislature passed a resolution, authorizing the appearance of the state to the suit, and the employment of counsel by the governor, to defend the rights of the state. In obedience to this resolution the governor, after reciting it, appointed counsel, under the seal of the state, to appear and make defence; either by objecting to the jurisdiction of this court, or by plea, answer or otherwise, at his discretion, as he should judge most proper.

Under this authority, an appearance was entered and at January term, a plea in bar of the plaintiff's bill was filed, in which it was averred: That in 1642, a station or monument was erected and fixed at a point believed to be on the true southern boundary line of Massachusetts, and a line continued therefrom to the Connecticut river, westwardly; which station or monument was well known, notorious, and has ever since been called Woodword and Saff-
*717 rey's * station, on Wrentham Plains. It then sets up the agreement of 1709, and subsequent proceedings at large; avers that the whole merits of plaintiff's case, as set forth in the bill, were fully heard, tried, and determined, in the hearing and by the judgment of the Rhode Island commissioners; that the agreement was fair, legal and binding between the parties; that it was a valid and effectual settlement of the matter in controversy; without cover, fraud, or misrepresentation, with a full and equal knowledge of all circumstances by both parties. That such agreement is still in force, no way waived, abandoned, or relinquished; and that the defendant has held, possessed, occupied, and enjoyed the land, propriety and jurisdiction, according to the well known and easily discovered station of Woodword and Saffrey, and the line run by them therefrom, from the date of the agreement to the present time, without hindrance or molestation.

The plea then sets forth the subsequent agreement of the two colonies, in 1717 and 1718, touching their boundaries, and a running and marking thereof by their respective commissioners, appointed for the purpose of finally settling the controversy; who, in 1718 agreed that the stake of Woodword and Saffrey, should be the point from which the dividing line should be run, and be forever the boundary between the two governments notwithstanding any former controversy or claim. That this agreement was recorded, ratified, and confirmed by the general assembly of Rhode Island; that no false representation was made to their commissioners; that the agreement was concluded fairly, in good faith, with full and equal knowledge by the respective parties, has never been annulled, rescinded or abandoned, and was in pursuance and completion of the agreement of 1709. The report of the commissioners is then set out, stating that in 1719

they ran and marked a line west 2° south from the stake of Woodword and Saffrey, at which they met, as the boundary; which report was approved by Rhode Island in the same year. The plea then makes the same averment as to these proceedings of 1717, 1718, and 1719, as it did in relation to those of 1709, 1710, and 1711; pleads both agreements and unmolested possession by the defendant, from their respective dates to the present time, as a bar to the whole bill, and against any other or further relief therein; prays the judgment of the Court whether the defendant shall make any further answer to the bill, and to be dismissed.

Then the defendant, not waiving, but relying on his plea, by
*718 way * of answer and in support of the plea as a bar to the bill, avers that both agreements were a valid and effectual settlement of the whole matter of controversy in the case, as is insisted on in the plea.

To this plea a replication was put in, but afterwards withdrawn, and notice given that the cause would be put down for hearing on the plea: the cause was continued at the last term; the plaintiff gave notice that he should at this term move to amend the bill; and the case is now before us for consideration, on a motion by the defendant, to dismiss the bill for want of jurisdiction in the cause.

However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it. 6 Peters, 709; 4 Russell, 415; 3 Peters, 203–7.

A motion to dismiss a cause pending in the courts of the United States, is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there the superior courts have a general jurisdiction over all persons within the realm, and all causes of action between them. It depends on the subject matter, whether the jurisdiction shall be exercised by a court of law or equity; but that court, to which it appropriately belongs, can act judicially upon the party and the subject of the suit; unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction, to an inferior and limited one. It is a necessary presumption, that the court of general jurisdiction can act upon the given case, when nothing appears to the contrary; hence has arisen the rule that the party claiming an exemption from its process, must set out the reasons by a special plea in abatement; and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must pro-
*719 ceed, in virtue of its general * jurisdiction. This rule prevails both at law and in equity. 1 Ves. sen. 204; 2 Ves. sen. 307; Mit. 183. A motion to dismiss, therefore, cannot be entertained, as it does not and cannot disclose a case of exception; and if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs.

A plaintiff in law or equity, is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ, or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court, to which he has driven the plaintiff by his plea. 1 Ves. sen. 203. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery; that the subject matter is cognizable only by the king in council, and not by any judicial power, 1 Ves. sen. 445; or that the parties, defendant, cannot be brought before any municipal court, on account of their sovereign character, and the nature of the controversy; as 2 Ves. jr. 371, 387; 2 Ves. jr. 56, 60; or in the very common cases which present the question, whether the cause properly belongs to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court; the objection goes to a denial of any jurisdiction of a municipal court in one class of cases; and to the jurisdiction of any court of equity or of law in the other; on which last, the court decides according to their legal discretion. An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue. 10 Peters, 473; Toland v. Sprague, 12 Peters, 300; but when the objection goes to the power of the court over the parties, or the subject matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process.

As a denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power to act, cannot
*720 be successful in an English court of general jurisdiction, * a motion like the present could not be sustained consistently with the principles of its constitution. But as this Court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is coram non judice, and its action a nullity. 10 Peters, 474; S. P. 4 Russ. 415. And whether the want or excess of power is objected by a party, or is apparent to the Court, it must surcease its action, or proceed extra-judicially.

Before we can proceed in this cause we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes. So they have been considered by this Court, through a long series of years and cases, to the present term; during which, in the case of The Bank of the United States v. Daniels, this Court has declared this to be a fundamental principle of the constitution: and so we shall consider it in deciding on the present motion. 2 Peters, 590, 91.

Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and

the transcendent power of parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority, 6 Wheat. 651; 8 Wheat. 584, 88; adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution it was ordained that this judicial power, in cases where a state was a party, should be exercised by this Court as one of original jurisdiction. The states waived their exemption from judicial power, 6 Wheat. 378, 80, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified. Massachusetts has appeared, submitted to the process in her legislative capacity, and plead in bar of the plaintiff's action, certain matters on which the judgment of the Court is asked; all doubts as to jurisdiction over the parties are thus at rest, as
*721 well * by the grant of power by the people, as the submission of the legislature to the process; and calling on the Court to exercise its jurisdiction on the case presented by the bill, plea, and answer.

Our next inquiry will be, whether we have jurisdiction of the subject matters of the suit, to hear and determine them.

That it is a controversy between two states, cannot be denied; and though the constitution does not, in terms extend the judicial power to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is, therefore, a question of construction, whether the controversy in the present case is within the grant of judicial power. The solution of this question must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this Court has always resorted in construing the constitution. It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the government of the United States. 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; 1 Wheat. 326; 4 Wheat. 407: leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them

would be probable, if not unavoidable, under a constitution of govern-
*722 ment * which made it the duty of the judicial power to decide all cases in law or equity arising under it, or laws passed, and treaties made by its authority.

By the judiciary act of 1789, the judicial system of the United States was organized, the powers of the different courts defined, brought into action, and the manner of their exercise regulated. The 13th section provided, "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." 1 Story's Laws, 59.

The power of congress to make this provision for carrying into execution the judicial power in such cases, has never been, and we think cannot be questioned; and taken in connection with the constitution, presents the great question in this cause, which is one of construction appropriate to judicial power, and exclusively of judicial cognizance, till the legislative power acts again upon it. Vide 3 Peters, 203. In deciding whether the present case is embraced or excluded by the constitution and judiciary act, and whether it is a case of lawful original cognizance by this Court, it is the exercise of jurisdiction; for it must be in the legal discretion of the Court, to retain or dismiss the bill of the plaintiffs. Act as we may feel it our duty to do, there is no appeal from our judgment, save to the amending power of the constitution; which can annul not only its judgments, but the Court itself. So that the true question is necessarily, whether we will so exercise our jurisdiction as to give a judgment on the merits of the case as presented by the parties, who are capable of suing and being sued in this Court, in law or equity, according to the nature of the case, and controversy between the respective states.

This Court in construing the constitution as to the grants of powers to the United States, and the restrictions upon the states, has ever held, that an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition: and have laid it down as a general rule, that where no exception is made in terms, none will be made by mere implication or construction. 6 Wh. 378; 8 Wh. 489, 490; 12 Wh. 438; 9 Wh. 206, 207, 216.

Then the only question is, whether this case comes within the rule
*723 * or presents an exception, according to the principles of construction adopted and acted on by this Court, in cases involving the exposition of the constitution and laws of the United States, which are construed as other instruments granting power or property. 12 Wh. 437; 6 Peters 738, 740. That some degree of implication must be given to words, is a proposition of universal adoption: implication is but another term for meaning and intention, apparent in the writing, on judicial inspection; "the evident consequence" 1 Bl. Com. 250; "or some necessary consequence resulting from the law," 2 Ves. sen. 351; or the words of an instrument; in the construction of which, the words, the subject, the context, the intention of the person using them, are all to be taken into view. 4 Wh. 415; 6 Peters, 739, 741. Such is the sense in which the common expression is used in the books, "express words or necessary implication," such as arise on the words, taken in connection with other sources of construction; but not by conjecture, supposition, or mere reasoning on the meaning or intention of the

writing. All rules would be subverted if mere extraneous matter should have the effect of interpreting a supreme law, differently from its obvious or necessarily to be implied sense: Vide 9 Wh. 188, &c.; so apparent as to overrule the words used; 6 Wh. 380. "Controversies between two or more states," "all controversies of a civil nature, where a state is a party;" are broad comprehensive terms; by no obvious meaning or necessary implication, excluding those which relate to the title, boundary, jurisdiction, or sovereignty of a state. 6 Wh. 378.

The judiciary act makes certain exceptions, which apply only to cases of private persons, and cannot embrace a case of state against state; established rules forbid the extension of the exception to such cases, if they are of a civil nature. What then are "controversies of a civil nature," between state and state, or more than two states?

We must presume that congress did not mean to exclude from our jurisdiction those controversies, the decision of which the states had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions. In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, 12 Wh. 354; 6 Wh. 416; 4 Peters, 431–2; to ascertain the old law, the mischief and the remedy. It is a part *724 of the public history of the United * States, of which we cannot be judicially ignorant, that at the adoption of the constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies. New Hampshire and New York contended for the territory which is now Vermont, until the people of the latter assumed by their own power the position of a state, and settled the controversy, by taking to themselves the disputed territory, as the rightful sovereign thereof. Massachusetts and Rhode Island are now before us. Connecticut claimed part of New York and Pennsylvania. She submitted to the decree of the council of Trenton, acting pursuant to the authority of the confederation, which decided that Connecticut had not the jurisdiction; but she claimed the right of soil till 1800. New Jersey had a controversy with New York, which was before this Court in 1832; and one yet subsists between New Jersey and Delaware. Maryland and Virginia were contending about boundaries, in 1835, when a suit was pending in this Court; and the dispute is yet an open one. Virginia and North Carolina contended for boundary till 1802; and the remaining states, South Carolina and Georgia, settled their boundary in the April preceding the meeting of the general convention, which framed and proposed the constitution. 1 Laws U. S. 466. With the full knowledge that there were at its adoption, not only existing controversies between two states singly, but between one state and two others, we find the words of the constitution applicable to this state of things, "controversies between two or more states." It is not known that there were any such controversies then existing, other than those which relate to boundary; and it would be a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on other subjects. This becomes the more apparent, when we consider the context and those parts of the constitution which bear directly on the boundaries of states; by which it is evident, that there remained no power in the contending

states to settle a controverted boundary between themselves, as states competent to act by their own authority on the subject matter, or in any department of the government, if it was not in this.

By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into "any treaty, *725 alliance, or confederation:" no power under the * government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause is a prohibition against any state entering "into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay." By this surrender of the power, which before the adoption of the constitution was vested in every state, of settling these contested boundaries, as in the plenitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this Court in Poole v. Fleeger, 11 Peters, 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Peters, 209; S. P. 1 Ves. sen. 448, 9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this Court in the Lessee of Sims v. Irvine, 3 Dall. 425–54; and in Marlatt v. Silk & M'Donald, 11 Peters, 2, 18; Barton v. Williams, 3 Wheat. 529–33, &c.

In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress for its consent, its giving its consent, and the action of this Court upon them; it is most manifest, that by universal consent and action, the words "agreement" and "compact," are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined that compacts of boundary were excluded, because not expressly named; on the contrary, they are held by the states, congress, and this Court, to be included by necessary implication; the evident consequence resulting from their known object, subject matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it *726 would * render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts. Not to prevent the states from settling their own boundaries, so far as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.

Every reason which has led to this construction, applies with equal force to the clause granting to the judicial power jurisdiction over controversies

between states, as to that clause which relates to compacts and agreements: we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary, are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress: a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited in express terms, to assent or dissent, where a compact or agreement is *727 referred to them by the states; and as the latter * can be exercised only by this Court, when a state is a party, the power is here, or it cannot exist. For these reasons we cannot be persuaded that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement.

There is another clause in the constitution which bears on this question. The judicial power extends to "controversies between citizens of different states;" "between citizens of the same state claiming lands under grants of different states." We cannot but know, judicially, that the latter classes of cases must necessarily arise on boundary; and that few if any ever arise from any other source. If there is a compact between the states, it settles the line of original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested; if there is no compact, then the controversy must be settled, by adjudging where the line of boundary ought to be, by the laws and rules appropriate to the case. 6 Wheat. 393; 2 Peters, 300. It is not recollected, that any such cases have ever arisen, "between citizens of the same state," as the judiciary acts have made no provision for this exercise of this undoubted constitutional jurisdiction; and it is not necessary for the decision of this cause, to inquire whether a law is necessary for this purpose. But for the other class of cases, "controversies between citizens of different states," the eleventh section of the judiciary act makes provision; and the circuit courts, in their original, and this Court in its appellate jurisdiction, have decided on the boundaries of the states, under whom the parties respectively claim; whether there has been a compact or not. The jurisdiction of the circuit court in such cases was distinctly

and expressly asserted by this Court as early as 1799, in Fowler v. Miller, 3 Dall. 411–12; S. P. 5 Peters, 290. In Handly's Lessee v. Anthony, the circuit court of Kentucky decided on the boundary between that state and Indiana, in an ejectment between these parties; and their judgment was affirmed by this Court. 5 Wheat. 375; 3 Wheat. 212–18; S. P. Harcourt v. Gaillard, 12 Wheat. 523. When the boundaries of states can be thus decided collaterally in suits between individuals, we cannot, by any just rule of interpretation, declare that this court cannot adjudicate on the question of boundary, when it is presented directly in a controversy betwen two or more states, and is the only point in the cause.

*728 * There is yet another source of reference, from which to ascertain the true construction of the constitution.

By the ninth article of confederation adopted by the legislatures of the several states, it is provided, "That the United States in congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or which may hereafter arise between two or more states, concerning boundary, jurisdiction, or any other cause whatever." It directed the appointment of a tribunal, whose judgment should be final and conclusive. It also gave to congress power to appoint a judicial tribunal to decide on a petition of either of the parties, claiming land under grants of two or more states, who had adjusted their boundaries, but had previously made the grants on which the controversy arose. One of the most crying evils of the confederation was, that it created no judicial power without the action of congress; and confined the power of that body to the appointment of courts for the trial of piracies and felonies committed on the high seas; for determining finally an appeal, in all cases of captures; and for the adjustment of the controversies before referred to. Yet defective as was the confederation in other respects, there was full power to finally settle controverted boundaries in the two cases, by an appeal by a state, or petition of one of its citizens. This power was given from the universal conviction of its necessity, in order to preserve harmony among the confederated states, even during the pressure of the revolution. If in this state of things, it was deemed indispensable to create a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might; when this power was plenary, its judgment conclusive on the right; while the other powers delegated to congress, were mere shadowy forms, one conclusion at least is inevitable. That the constitution which emanated directly from the people, in conventions in the several states, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of confederation adopted by the mere legislative power of the states, had given to a special tribunal appointed by congress, whose members were the mere creatures and representatives of state legislatures, appointed by them, without any action by the people of the state. This Court exists by a direct grant from the people, of their judicial power; it is exercised by their authority, as their agent selected by themselves, for the pur-

*729 poses specified; the people of the states as they respectively * became parties to the constitution, gave to the judicial power of the United States, jurisdiction over themselves, controversies between states, between citizens of the same or different states, claiming lands under their conflicting grants, within disputed territory. No fact was more prominent in our history, none could have

been more strongly impressed on the members of the general and state conventions, than that contests for the vacant lands of the crown, long threatened the dissolution of the confederation, which existed practically and by common consent, from 1774 to 1781; when, after five years of discussion, it was ratified by the legislatures of all the states. This Court has attested the fact. 6 Cranch, 142; 5 Wheat. 376. Similar danger was imminent, from controversies about boundaries between the states, till provision was made for their decision, with a proviso, "That no state should be deprived of territory for the benefit of the United States." 1 Laws U. S. 17. These two provisions taken in connection, put an end to any fears of convulsion, by the contests of states about boundary and jurisdiction, when any state could, by appeal, bring the powers of congress and a judicial tribunal into activity; and the United States could not take any vacant land within the boundary of a state. Hence resulted the principles laid down by this Court in Harcourt and Gaillard, 12 Wheat. 526, that the boundaries of the United States were the external boundaries of the several states; and that the United States did not acquire any territory by the treaty of peace, in 1783.

Yet though this express provision was made to settle controverted boundaries by judicial power, congress had no supervision over compacts and agreements between states as to boundary, save on grants made before the compact; the states did, and could so settle them without the consent of congress, to whom, as no express power on or over the subject of such compacts was delegated, their dissent could not invalidate them. Such was the law of the confederacy during a common war, when external danger could not suppress the danger of dissolution from internal dissensions; when owing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject matters, on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary.

*730 The constitution, which superseded the articles of confederation, erected * a new government, organized it into distinct departments, assigning to each its appropriate powers, and to congress the power to pass laws for carrying into execution the powers granted to each; so that the laws of the Union could be enforced by its own authority, upon all persons and subject matters, over which jurisdiction was granted to any department, or officer of the government of the United States. It was to operate in a time of peace with foreign powers, when foreign pressure was not in itself some bond of union between the states, and danger from domestic sources might be imminent; to extend the legislative, executive and judicial power, alike over persons and states, on the enumerated subjects by their own grants. The states submitted to its exercise, waived their sovereignty, and agreed to come to this Court to settle their controversies with each other, excepting none in terms. So they had agreed by the confederation; not only not excepting, but in express terms including, all disputes and differences whatever.

In the front of the constitution is a declaration by the sovereign power from which it emanated; that it was ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity," &c. Whether it was best calculated to effect these objects by making the judicial power utterly incompetent to exercise a jurisdiction expressly delegated to the old congress and its con-

stituted court, over states and their boundaries, in the plenitude of absolute power, yet granted only by the legislative power of the several states; or whether the powers granted to this Court by the people of all the states, ought, by mere construction and implication, to be held inefficient for the objects of its creation, and not capable of "establishing justice" between two or more states; are the direct questions before us for consideration.

Without going further into any general consideration on the subject, there is one which cannot be overlooked, and is imperious in its results.

Under the confederation, the states were free to settle their controversies of any kind whatever by compact or agreement; under the constitution they can enter into none without the consent of congress, in the exercise of its political power; thus making an amicable adjustment a political matter for the concurring determination of the states and congress, and its construction a matter of judicial cognizance by any court to which the appropriate resort may be had, by the judiciary act.

This has uniformly been done in the courts of the states and
*731 * Union; no one has ever deemed such an exercise of power to be extra-judicial, or a case which called for it to be coram non judice. When, therefore, the court judicially inspects the articles of confederation, the preamble to the constitution, together with the surrender, by the states, of all power to settle their contested boundaries, with the express grant of original jurisdiction to this Court; we feel not only authorized, but bound to declare that it is capable of applying its judicial power, to this extent at least: 1. To act as the tribunal substituted by the constitution in place of that which existed at the time of its adoption, on the same controversies, and to a like effect. 2. As the substitute of the contending states, by their own grant, made in their most sovereign capacity, conferring that preexisting power, in relation to their own boundaries, which they had not surrendered to the legislative department; thus separating the exercise of political from judicial power, and defining each.

There is but one power in this Union, paramount to that by which, in our opinion, this jurisdiction has been granted, and must be brought into action if it can. That power has been exerted in the 11th amendment: but while it took from this Court all jurisdiction, past, present, and future, 3 Dall. 382, of all controversies between states and individuals; it left its exercise over those between states as free as it had been before. This, too, with the full view of the decisions of this Court, and the act of 1789, giving it exclusive jurisdiction of all controversies of a civil nature, where a state is a party; and there can be no subject on which the judicial power can act with a more direct and certain tendency, to effectuate the great objects of its institution, than the one before us. If we cannot "establish justice" between these litigant states, as the tribunal to which they have both submitted the adjudication of their respective controversies, it will be a source of deep regret to all who are desirous that each department of the government of the Union should have the capacity of acting within its appropriate orbit, as the instrument appointed by the constitution, so to execute its agency as to make this bond of union between the states more perfect, and thereby enforce the domestic tranquillity of each and all.

Being thus fully convinced that we have an undoubted jurisdiction of this cause, as far as we have proceeded in examining whether, by a true and just

construction of the constitution and laws, it is included or excluded, in the
*732 grant of judicial power, for any purpose; * we now proceed to inquire how that jurisdiction shall be exerted; whether to retain or dismiss the complainant's bill.

This depends on our jurisdiction over any of the matters on which the plaintiff asks our interposition. If there is any one subject on which we can act, the bill must be retained: so that the true inquiry is, not as to the extent, but the existence of any jurisdiction. 1 Ves. sen. 203, 205; 2 Ves. sen. 356.

The bill prays, 1. For the ascertaining and establishing the boundary line between the states, by the order of this Court.

2. That the right of jurisdiction and sovereignty of the plaintiff to the disputed territory may be restored to her, and she be quieted in the enjoyment thereof, and her title thereto; and for further relief. If we can decree any relief specially called for, or any other relief, consistently with the specific prayer, we must proceed in the cause. 10 Pet. 228; 8 Pet. 536.

The first prayer is, to ascertain and establish a boundary. Having expressed our opinion that the subject of boundary is within our jurisdiction, we must exercise it to some extent, and on some matter connected with, or dependent upon it; and as the bill is on the equity side of the Court, it must be done according to the principles and usages of a court of equity.

In the bill are set forth various charters from the crown, from 1621, to 1691, and sundry proceedings by the grantees and the crown, in relation thereto; also agreements between the parties as colonies and states, for adjusting their boundaries, and the proceedings of their respective legislatures and commissioners, in relation thereto, from 1709 to 1818. The plaintiff relies on the charters of the two colonies, as the rule by which to settle the boundary; on the continued assertion of her rights, as well by the charter, as her previous purchase from the Indians: denying altogether the validity of the agreement and subsequent proceedings; averring that they were made under misrepresentation and mistake, as to material facts. On the other hand, the defendant pleads the agreements as a bar; that they are binding, and have been ratified by the plaintiff: so that the plaintiff rests his case on a question of original boundary, unaffected by any agreement; the defendant rests on the agreements, without regard to the original charter boundaries. One asking us to annul, the other to enforce the agreements; one averring continual claim, the other setting up the quiet, unmolested possession for more than a century, in strict conformity to, and by the line
*733 in the agreements. * Our first inquiry then must be, as to our power to settle the boundary; in other words, to decide what portion of the territory in dispute belongs to the one state or the other, according to the line which is their common boundary. There is not in fact, nor by any law can be, any territory which does not belong to one or the other state; so that the only question is, to which the territory belongs. This must depend on the right by which each state claims the territory in question. Both claim under grants of contiguous territory, by the king, in whom was the absolute propriety and full dominion in and over it; 9 Peters, 745, 748; 8 Wheat. 595; the line drawn, or pointed out in his grant, is therefore that which is designated in the two charters as the common boundary of both. 5 Wheat. 375.

The locality of that line is matter of fact, and, when ascertained separates

the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty are inseparable incidents, and remain so, till the state makes some cession. The plain language of this Court in the United States v. Bevans, 3 Wheat. 386, et seq., saves the necessity of any reasoning on this subject. The question is put by the Court—"What then is the extent of jurisdiction which a state possesses?" "We answer, without hesitation, the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power. The place described, is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to (by) the United States, Ib. 387." "A cession of territory is essentially a cession of jurisdiction, Ib. 388. Still, the general jurisdiction over the place, subject to this grant of power (to the United States,) adheres to the territory as a portion of sovereignty not yet given away." Ib. 389.

This principle is embodied in the sixteenth clause of the eighth section, first article of the constitution, relative to this district; forts, arsenals, dock yards, magazines; and uniformly applied to all acquisitions of territory by the United States, in virtue of cessions by particular states, or foreign nations. 5 Wheat. 324; 5 Wheat. 375; 3 Wheat. 388, 89; 2 Peters, 300, &c. Title, jurisdiction, sovereignty, are therefore dependent questions, necessarily settled
*734 when boundary is ascertained, which being the line of territory, is the * line of power over it: so that great as questions of jurisdiction and sovereignty may be, they depend in this case on two simple facts. 1. Where is the southernmost point of Charles river. 2. Where is the point, three English miles in a south line, drawn from it. When these points are ascertained, which by the terms are those called for in both charters, then an east and west line from the second point, is necessarily the boundary between the two states, if the charters govern it.

If this Court can, in a case of original jurisdiction, where both parties appear, and the plaintiff rests his case on these facts, proceed to ascertain them; there must be an end of this cause when they are ascertained, if the issue between them is upon original right by the charter boundaries. We think it does not require reason or precedent, to show that we may ascertain facts, with or without a jury, at our discretion, as the circuit courts, and all others do, in the ordinary course of equity: our power to examine the evidence in the cause, and thereby ascertain a fact, cannot depend on its effects, however important in their consequences. Whether the sovereignty of the United States, of a state, or the property of an individual, depends on the locality of a tree, a stone, or watercourse; whether the right depends on a charter, treaty, cession, compact, or a common deed; the right is to territory great or small in extent, and power over it, either of government or private property; the title of a state is sovereignty, full and absolute dominion; 2 Peters, 300, 301; the title of an individual such as the state makes it by its grant and law.

No court acts differently in deciding on boundary between states, than on lines between separate tracts of land: if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case

appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or a state, is and shall be.

When no other matter affects a boundary, a decree settles it as having been by original right at the place decreed; in the same manner as has been stated where it is settled by treaty or compact; all dependent rights are settled when boundary is; 1 Ves. sen. 448 to 450. If, heretofore, there was an issue in this case, on the locality of the point three miles south of the southermost point of Charles
*735 river, we * should be competent to decide it; and decree where the boundary between the states was in 1629, and 1663, at the dates of their respective charters.

On these principles, it becomes unnecessary to decide on the remaining prayers of the bill; if we grant the first, and settle boundary, the others follow; and if the plaintiff obtains relief as to that, he wants no other. The established forms of such decrees extend to every thing in manner or way necessary to the final establishment of the boundary, as the true line of right and power between the parties.

This, however, is not a case where there is an issue on original boundary; the defendant does not rest on that fact, but puts in a plea setting up an agreement or compact of boundary between the parties while colonies, and the actual establishment of a line agreed on, run, marked, and ratified by both colonies, long possession, and a right by prescription to all the territory north of such line. This presents a case on an agreement on one side, alleged to be conclusive upon every matter complained of in the bill; on the other, to be invalid for the reasons alleged. If this matter of the plea is sufficient in law, and true in fact, it ends the cause; if not so in both respects, then the parties are thrown back on their original rights, according to their respective claims to the territory in question; by charters, or purchase from the Indians. If, then, we can act at all on the case, we must, on this state of the pleadings, decide on the legal sufficiency of the plea, if true, as on a demurrer to it; next, on the truth of its averments; and then decide whether it bars the complaint of the plaintiff, and all relief: if it does not, then we must ascertain the fact on which the whole controversy turns. In the first aspect of the case, it presents a question of the most common and undoubted jurisdiction of a court of equity; an agreement which the defendant sets up as conclusive to bar all relief, and the plaintiff asks to be declared void, on grounds of the most clear and appropriate cognizance in equity, and not cognizable in a court of law. A false representation made by one party, confided in by the other, as to a fact on which the whole cause depends; the execution of the agreement, and all proceedings under it, founded on a mistaken belief of the truth of the fact represented. We must, therefore, do something in the cause; unless the defendants have, in their objections, made out this to be an exception to the usual course of equity, in its action on questions of boundary.

*736 * It is said, that this is a political, not civil controversy between the parties; and so not within the constitution, or thirteenth section of the judiciary act.

As it is viewed by the Court, it is on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles river; which is the only question which can arise under the

charter. Taking the case on the bill and plea, the question is, whether the stake set up on Wrentham Plain, by Woodword and Saffrey, in 1642, is the true point from which to run an east and west line, as the compact boundary between the states. In the first aspect of the case, it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature, of frequent occurrence in suits between individuals. This controversy, then, cannot be a political one, unless it becomes so by the effect of the settlement of the boundary; by a decree on the fact, or the agreement; or because the contest is between states as to political rights and power, unconnected with the original or compact boundary.

We will not impute to the men who conducted the colonies at home, and in congress, in the three declarations of their rights previous to the consummation of the revolution, from 1774, to 1776, and its final act, by a declaration of the rights of the states, then announced to the world; an ignorance of the effects of territorial boundary between them, in both capacities. Every declaration of the old congress would be falsified, if the line of territory is held not to have been, from the first, the line of property and power. The congress, which, in 1777, framed and recommended the articles of confederation for adoption, by the legislative power of the several states; were acting in a spirit of fatuity, if they thought that a final and conclusive judgment on state boundaries, was not equally decisive as to the exercise of political power by a state; making it rightful within, but void beyond the adjudged line.

The members of the general and state conventions, were alike fatuitous, if they did not comprehend, and know the effect of the states submitting controversies between themselves, to judicial powers; so were the members of the first congress of the constitution, if they could see, and not know, read, and not understand its plain provisions, when many of them assisted in its frame.

The founders of our government could not but know, what has
*737 * ever been and is familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them. In the declaration of independence, the states assumed their equal station among the powers of the earth, and asserted, that they could of right do, what other independent states could do; "declare war, make peace, contract alliances;" of consequence, to settle their controversies with a foreign power, or among themselves, which no state, and no power could do for them. They did contract an alliance with France, in 1778; and with each other, in 1781: the object of both was to defend and secure their asserted rights as states; but they surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies; thus making them judicial questions, whether they arose on "boundary, jurisdiction, or any other cause whatever." There is neither the authority of law or reason for the position, that boundary between nations or states, is, in its nature, any more a political question, than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for states, which states alone could do before. We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary; 6 Peters, 714; 9 Peters, 748; a court,

or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; 11 Ves. 294; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one to be decided by the sic volo, sic jubeo, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.

It has never been contended that prize courts of admiralty jurisdic-
*738 tion, * or questions before them, are not strictly judicial; they decide on questions of war and peace, the law of nations, treaties, and the municipal laws of the capturing nation, by which alone they are constituted; a fortiori, if such courts were constituted by a solemn treaty between the state under whose authority the capture was made, and the state whose citizens or subjects suffer by the capture. All nations submit to the jurisdiction of such courts over their subjects, and hold their final decrees conclusive on rights of property. 6 Cr. 284–5.

These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or state exerts by his or its own authority, as reprisal and confiscation; 3 Ves. 429: the latter is that which is granted to a court or judicial tribunal. So of controversies between states; they are in their nature political, when the sovereign or state reserves to itself the right of deciding on it; makes it the "subject of a treaty, to be settled as between states independent," or "the foundation of representations from state to state." This is political equity, to be adjudged by the parties themselves, as contradistinguished from judicial equity, administered by a court of justice, decreeing the equum et bonum of the case, let who or what be the parties before them. These are the definitions of law as made in the great Maryland case of Barclay v. Russell, 3 Ves. 435, as they have long been settled and established. Their correctness will be tested by a reference to the question of original boundary, as it ever has been, and yet is, by the constitution of England; which was ours before the revolution, while colonies; 8 Wheat. 588; as it was here from 1771 to 1781, thence to 1788, and since by the constitution as expounded by this Court.

If the question concerning the boundaries of contiguous pieces of land, manors, lordships, or count[ie]s palatine, arises within the realm, it was cognizable in the high court of chancery, in an appropriate case; a mere question of title to any defined part, was cognizable only by ejectment or real action in a court of law, which were in either case judicial questions. 1 Ves. sen. 446–7. If between counts Palatine, boundary involved not only the right of soil, but the highest franchise known to the law of England, jura regalia, to the same extent as the king in right of the crown and royal jurisdiction. Palatine jurisdiction was a qualified sovereignty, till abridged by the 24 H. 8 ch. 24. Seld. Tit. Hon. 380, 382, 638, 838; 1 Black. Com. 108–17; 7 Co. 19; Cro. E. 240;

*739 4 D. C. D. 450, &c. The * count appointed the judges of courts of law and equity; the king's writs did not run into his county; writs were in his name, and indictments against his peace. Co. Inst. 204–18. Yet his jurisdiction, his royalties, and jura regalia, &c., existed or disappeared, according as a chancellor should decree as to boundary. Penn v. Baltimore, 1 Ves. sen. 448–9, &c. The king had no jurisdiction over boundary, within the realm, without he had it in all his dominions, as the absolute owner of the territory, from whom all title and power must flow, 1 Bl. Com. 241; Co. Litt. 1; Hob. 322; 7 D. C. D. 76; Cowp. 205–11; 7 Co. 17, b, as the supreme legislator; save a limited power in parliament. He could make and unmake boundaries, in any part of his dominions, except in proprietary provinces. He exercised this power by treaty, as in 1763, by limiting the colonies to the Mississippi, whose charters extended to the South sea: by proclamation, which was a supreme law, as in Florida and Georgia, 12 Wheat. 524; 1 Laws U. S. 443–51; by order in council, as between Massachusetts and New Hampshire, cited in the argument. But in all cases it was by his political power, which was competent to dismember royal, though it was not exercised on the chartered or proprietary provinces. M'Intosh v. Johnson, 8 Wheat. 580. In council, the king had no original judicial power. 1 Ves. sen 447. He decided on appeals from the colonial courts, settled boundaries, in virtue of his prerogative, where there was no agreement; but if there is a disputed agreement, the king cannot decree on it, and therefore, the council remit it to be determined in another place, on the foot of the contract. 1 Ves. sen. 447. In virtue of his prerogative, where there was no agreement 1 Ves. sen. 205, the king acts not as a judge, but as the sovereign acting by the advice of his counsel, the members whereof do not and cannot sit as judges. By the statute 20 E. 3, ch. 1, it is declared that "the king hath delegated his whole judicial power to the judges, all matters of judicature according to the laws," 1 Ruff. 246; 4 Co. Inst. 70, 74; he had, therefore, none to exercise: and judges, though members of council, did not sit in judicature, but merely as his advisers.

The courts had no jurisdiction over the colonies, persons or property therein, except in two cases; colonies and provinces being corporations under letters patent, 3 Ves. 435, were amenable to the king in the king's bench, by quo warranto, which is a prerogative writ; and a scire facias, in chancery, to repeal the letters patent, which is a part of the statutory jurisdiction of that court in such *740 cases, by * the court in chancery, also in virtue of the royal prerogative, by which the charter was made. But chancery could not act on boundaries in the royal or chartered colonies: it could act on lords proprietors of provinces, when they were in the realm, where they were subjects; though in their provinces they were sovereign, dependent only on the crown and the general supremacy of parliament. Acts of parliament did not bind them, unless extended to them expressly, or by necessary consequence, 2 Ves. sen. 351. They had all the powers of counts palatine, the absolute propriety of soil, and the powers of legislation; the only restraint upon them was by the powers reserved to the king by his letters patent, and allegiance to the crown in matters of prerogative not granted. The power of parliament was, on the American principle of the revolution, confined to the regulation of "external commerce;" though by the English principle, it extended to all cases whatever. Yet sovereign as they were as to all things, except those relating to the powers of the king and parlia-

ment, chancery could and did act on agreements between them as to their boundaries, in the case of Penn v. Baltimore; though it could not have done so had they stood at arm's length; in which case the king in counsel could alone have decided the original boundary on an appeal, 1 Ves. sen. 446. Chancery also could and did decide on the title to the Isle of Man, which was a feudal kingdom: on a bill for discovery of title, relief as to rectories and tithes, which was a mere franchise, a plea to the jurisdiction was overruled. Derby v. Athol, 1 Ves. sen. 202; S. P. Bishop of Sodor & Man v. E. Derby, 2 Ves. sen. 337, 356.

In each of these cases, objections to the jurisdiction were made similar to those made in this, but were overruled; and neither the authority or principles of either have been questioned: on the contrary, they have been recognised and adopted by all courts which follow the course of the law of England; yet each involve the same question as the present. In the first, the decree as to boundary settled by consequence the collateral and dependent questions of title, jurisdiction, and sovereignty, of and over the disputed territory; in the two last on a suit for rectories and tithes, the title to a feudal kingdom was but a dependent matter and was settled by deciding that the bishop had a right to the tithes he claimed.

The same principle was settled in the case of the Nabob of the Carnatic v. The East India Company, though it is commonly referred to in favour of a contrary position.

*741 * On the original pleadings, the case was on a bill for an account founded on two agreements between the parties, in 1785 and 1787; the defendants plead their rights and privileges under their charter, with power to make peace and war within its limits; that the plaintiff was a sovereign prince; that the agreements stated in the bill were made with him in their respective capacities, one as an absolute, the other as a qualified sovereign; and that the matters therein contained related to peace and war, and the security and defence of their respective territorial possessions.

The plea was considered and overruled by the chancellor; thus exercising jurisdiction to that extent. 1 Ves. 371, 387. An answer was then put in, containing the same matter as the plea; adding that the agreements between the parties were treaties of a federal character, both being sovereigns; and that the agreement of 1787 was a final treaty; and, therefore, the subject matters thereof were cognizable by the law of nations not by a municipal court. The bill was dismissed on this ground: "It is a case of mutual treaty between persons acting, in that instance, as states independent of each other; and the circumstances that the East India Company are mere subjects with relation to this country, has nothing to do with that. That treaty was entered into with them as a neighbouring independent state, and is the same as if it was a treaty between two sovereigns; and consequently is not a subject of municipal private jurisdiction." It thus is manifest, that if the answer had been to the merits, there must have been a decree: the dismissal resulted from the new matter added, as is evident from the opinion of the chancellor on the plea; and of Lord Commissioner Eyre, on the answer, and his closing remarks in which he declares; "that the case was considered wholly independent of the judgment on the plea, and was decided on the answer, which introduced matters showing that it was not mercantile in its nature, but political;

and therefore, the decision stood wholly clear of the judgment on the plea." 2 Ves. jr. 56, 60.

That a foreign sovereign may sue in an English court of law or equity, was settled in cases brought by the king of Spain, Hob. 113. That a foreign government may sue in chancery, by such agents as it authorizes to represent them, on whom a cross bill can be served, with such process as will compel them to do justice to the defendant, was decided in the Columbian Government v. Rothschild, 1 Sim. 104. These cases were recognized in The King of Spain v. Machado,
*742 by the house of lords; who held that a king had the same right to * sue as any other person, but that when he did sue in chancery, it was as any other suitor, who sought or submitted to its jurisdiction; that it could decide on the construction and validity of the treaties between France and the allied sovereigns of Europe in 1814; and on the validity of a private and separate treaty between France and Spain.

The case involved both questions; both were fully considered by the lords, in affirming the decree of the chancellor, overruling the demurrer, 4 Russell, 560; which assigned for cause that the plaintiff had not made out a case for any relief in a court of equity, for the reasons assigned in the argument: that a foreign sovereign could not sue in virtue of his prerogative rights; that an English court would not enforce these rights, accruing out of a treaty with France, which was inconsistent with the existing relations between each of those countries, (France and Spain) and the king of England. 2 Bligh. P. C. new series, 31, 44, 46, 50, 60.

The court of king's bench also will consider the effect of the declaration of independence and treaty of peace, in an action on a bond. Follett v. Ogden, 3 D. & E. 730.

From this view of the law of England, the results are clear, that the settlement of boundaries by the king in council, is by his prerogative; which is political power acting on a political question between dependent corporations or proprietaries, in his dominions without the realm. When it is done in chancery, it is by its judicial power, in "judicature according to the law," and necessarily a judicial question, whether it relates to the boundary of provinces, according to an agreement between the owners, as Penn. v. Baltimore; the title to a fuedal kingdom, in a suit appropriate to equity, where the feudal king appears and pleads, as in the case of the Isle of Man; or on an agreement between a foreign sovereign and the East India Company, in their mere corporate capacity. But when the company assume the character of a sovereign, assert the agreement to be a "federal treaty," between them and the plaintiff, as neighbouring sovereigns, each independent, and the subject matter to be peace and war, political in its nature, on which no municipal court can act by the law of nations, chancery has no jurisdiction but to dismiss the bill. Not because it is founded on a treaty, but because the defendant refused to submit it to judicial power: for, had the Company not made the objection, by their answer, the court must have pro-
*743 ceeded as in The King of Spain v. Machado, and decreed on * the validity, as well as the construction of the treaties. The court, in one case, could not force a sovereign defendant to submit the merits of the case to their cognizance; but in the other, when he was plaintiff, and a subject was a defendant, who appeared and plead, the whole subject matter of the pleadings was decided

by judicial power, as a judicial question; and such has been, and is the settled course of equity in England.

In the colonies, there was no judicial tribunal which could settle boundaries between them; for the court of one could not adjudicate on the rights of another, unless as a plaintiff. The only power to do it remained in the king, where there was no agreement; and in chancery, where there was one, and the parties appeared: so that the question was partly political and partly judicial, and so remained till the declaration of independence. Then the states, being independent, reserved to themselves the power of settling their own boundaries, which was necessarily a purely political matter, and so continued till 1781. Then the states delegated the whole power over controverted boundaries to congress, to appoint and its court to decide, as judges, and give a final sentence and judgment upon it, as a judicial question, settled by a specially appointed judicial power, as the substitute of the king in council, and the court of chancery in a proper case; before the one as a political, and the other as a judicial question.

Then came the constitution, which divided the power between the political and judicial departments, after incapacitating the states from settling their controversies upon any subject, by treaty, compact, or agreement; and completely reversed the long established course of the laws of England. Compacts and agreements were referred to the political, controversies to the judicial power. This presents this part of the case in a very simple and plain aspect. All the states have transferred the decision of their controversies to this Court; each had a right to demand of it the exercise of the power which they had made judicial by the confederation of 1781 and 1788; that we should do that which neither states or congress could do, settle the controversies between them. We should forget our high duty, to declare to litigant states that we had jurisdiction over judicial, but not the power to hear and determine political controversies, that boundary was of a political nature, and not a civil one; and dismiss the plaintiff's bill from our records, without even giving it judicial consideration. We should equally for-
*744 get the dictates * of reason: the known rule drawn by fact and law; that from the nature of a controversy between kings or states, it cannot be judicial; that where they reserve to themselves the final decision, it is of necessity by their inherent political power; not that which has been delegated to the judges, as matters of judicature, according to the law. These rules and principles have been adopted by this Court from a very early period.

In 1799, it was laid down, that though a state could not sue at law for an incorporeal right, as that of sovereignty and jurisdiction; there was no reason why a remedy could not be had in equity. That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this Court might appoint commissioners to ascertain and report them; since it is monstrous to talk of existing rights, without correspondent remedies. 3 Dall. 413. In New Jersey v. Wilson, the only question in the case was whether Wilson held certain lands exempt from taxation. 7 Cr. 164. In Cohens v. Virginia, the Court held, that the judicial power of the United States must be capable of deciding any judicial question growing out of the constitution and laws. That in one class of cases, "the character of the parties is every thing, the nature of the case nothing;" in the other, "the nature of the case is every thing, the character of the parties nothing." That the clause relating to cases in law or equity, arising under the constitution, laws, and treaties, makes no exception in terms, nor

regards "the condition of the party." If there be any exception, it is to be implied against the express words of the article. In the second class, "the jurisdiction depends entirely on the character of the parties," comprehending "controversies between two or more states." "If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." 6 Wh. 378, 384, 392–3.

In the following cases it will appear, that the course of the Court on the subject of boundary, has been in accordance with all the foregoing rules; let the question arise as it may, in a case in equity, or a case in law, of a civil or criminal nature; and whether it affects the rights of individuals, of states, or the United States, and depends on charters, laws, treaties, compacts, or cessions which relate to boundary. In Robinson v. Campbell, the suit involved the construction of the compact of boundary between Virginia and North Carolina, made
*745 in 1802; and turned on the question, whether the land in controversy * was always within the original limits of Tennessee, which the court decided. 3 Wh. 339, 386, as before stated. In Burton v. Williams, the case involved the questions certified for the opinion of this Court were: 1st, whether the place at which the offence was committed, was within the jurisdiction of Massachusetts; and 2d, whether it was committed within the jurisdiction of the circuit court of that district. It was considered and decided, as a question of boundary 3 Wh. 339, 386, as before stated. In Burton v. Williams, the case involved a collision of interest between North Carolina, Tennessee, and the United States, under the cessions by the former to the two latter, in which this Court reviewed all the acts of congress and of the two states on the subject, and the motives of the parties, to ascertain whether the casus fœderis had ever arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. The Court use this language in relation to it: "The members of the American family possess ample means of defence under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away." It is difficult to imagine what other means of defence existed in such a case, unless those which the Court adopted, by construing the acts recited, as the contracts of independent states, by those rules which regulate contracts relating to territory and boundary. 3 Wh. 529, 533, 538. In De La Croix v. Chamberlain, it was held, that "a question of disputed boundary between two sovereign, independent nations, is indeed more properly a subject for diplomatic discussion and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties." 12 Wh. 600. Accordingly, in Harcourt v. Gailliard, which arose on a British grant made in 1777, the Court decided the case by reference to the treaty of 1763, the acts of the king before the revolution, the effect of the declaration of independence and treaty of peace in 1783, in order to ascertain the original boundary between Florida and Georgia; on which the whole case turned. 12 Wh. 524. In Henderson v. Poindexter, the same point arose, and the same course was taken; the treaty of boundary with Spain in 1795, was also considered by the Court, as well as the cession by Georgia to the United States
*746 in 1802, and the various acts of congress on the * subject. 12 Wh. 530, 534, &c. In Patterson v. Jenckes, the title depended on the boundary be-

tween Georgia and the Cherokees; and the only question was, as to the territorial limits of the state, according to the treaties with them and that state, which the Court defined, and decided accordingly. 2 Peters, 225–7, &c. So they had previously done in various cases, arising on the boundary between North Carolina and the Cherokees. 1 Wh. 155; 2 Wh. 25; 9 Wh. 673; 11 Wh. 380.

In Foster & Elam v. Neilson, two questions arose: 1. On the boundary of the treaty of 1803, ceding Louisiana to the United States, as it was before the cession of the Floridas by Spain, by the treaty of 1819: 2d. The construction of the eighth article of that treaty. Both claimed the territory lying north of a line drawn east from the Iberville, and extending from the Mississippi to the Perdido. The title to the land claimed by the parties, depended on the right of Spain to grant lands within the disputed territory, at the date of the Spanish grant to the plaintiff, in 1804. He claimed under it, as being then within the territory of Spain; and confirmed absolutely by the treaty of cession: the defendant rested on his possession. On the first question, the Court held, that as long as the United States contested the boundary, it was to be settled by the two governments, and not by the Court; but if the boundary had been settled between France, while she held Louisiana, and Spain while she held Florida, or the United States and Spain had agreed on the boundary after 1803; then the Court could decide it as a matter bearing directly on the title of the plaintiff. On the second question, they held, that as the government had up to that time construed the eighth article of the treaty of 1819, to be a mere stipulation for the future confirmation of previous grants by Spain, to be made by some legislative act, and not a present confirmation, absolute and final by the mere force of the treaty itself, as a supreme law of the land, the Court was bound not to give a different construction. On that construction, the question was, by whom the confirmation should be made; the Court held the words of the treaty to be the language of contract, to be executed by an act of the legislature, of course by political power; to be exercised by the congress at its discretion; on which the Court could not act. But the Court distinctly recognised the distinction between an executory treaty, as a mere contract between nations, to be carried into execution by the sovereign power of the respective parties, and an executed treaty, effecting of itself the object to
*747 be accomplished, and defined the line * between them thus: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract; when either of the parties stipulate to perform a particular act; the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract, before it can become a rule for the Court." Adopting the construction given by congress, and the boundary being disputed in 1804, when the grant was made, the Court considered both to be political questions; and held them not to be cognizable by judicial power. 2 Peters, 253, 299, 306, 309, 314, 15. All the principles laid down in this case, were fully considered and affirmed in the United States v. Arredondo; which arose under an act of congress, submitting to this Court the final decision of controversies between the United States and all persons claiming lands in Florida, under grants, &c., by Spain, and prescribing the rules for its decision, among which was the "stipulations of any treaty," &c. Thus acting under the

authority delegated by congress; the Court held that the construction of the eighth article of the treaty of 1819, by its submission to judicial power, became a judicial question; and on the fullest consideration, held, that it operated as a perfect, present, and absolute confirmation of all the grants which come within its provision. That no act of the political department remained to be done; that it was an executed treaty, the law of the land, and a rule for the Court. 6 Peters, 710, 735, 741, 742, 743. In the United States v. Percheman, the Court, on considering the necessary effect of this construction, repudiated that which had been given in Foster & Elam v. Neilson, 7 Peters, 89. In the numerous cases which have arisen since, the treaty has been taken to be an executed one, a rule of title and property, and all questions arising under it to be judicial; and congress has confirmed the action of the Court whenever necessary. In New Jersey v. New York, the Court were unanimous in considering the disputed boundary between these states, to be within their original jurisdiction, and reaffirming the jurisdiction of the circuit courts, in cases between parties claiming lands under grants from different states: the only difference of opinion was on one point, suggested by one of the judges, whether as New York had not appeared, the Court would award compulsory process, or proceed ex parte; a point which does not arise in this
*748 cause, and need * not to be considered in its present stage; as Massachusetts has appeared and plead to the merits of the bill.

If judicial authority is competent to settle what is the line between judicial and political power and questions, it appears from this view of the law, as administered in England and the courts of the United States, to have been done without any one decision to the contrary, from the time of Edward the Third. The statute referred to, operated like our constitution to make all questions judicial, which were submitted to judicial power, by the parliament of England, the people or legislature of these states, or congress; and when this has been done by the constitution, in reference to disputed boundaries, it will be a dead letter if we did not exercise it now, as this Court has done in the cases referred to.

The course of the argument made it necessary for the court to pursue that which has been taken. Having disposed of the leading objection to jurisdiction, we will examine the others.

It has been argued by the defendant's counsel, that by the declaration of independence, Massachusetts became a sovereign state over all the territory in her possession, which she claimed by charter or agreement; in the enjoyment of which she cannot be disturbed.

To this objection there are two obvious answers: 1st. By the third article of confederation, the states entered into a mutual league for the defence of their sovereignty, their mutual and general welfare; being thus allies in the war of the revolution, a settled principle of the law of nations, as laid down by this Court, prevented one from making any acquisition at the expense of the other. 12 Wh. 525–6. This alliance continued in war and peace, till 1788; when, 2d: Massachusetts surrendered the right to judge of her own boundary, and submitted the power of deciding a controversy concerning it to this Court. 6 Wh. 378, 380, 393.

It is said, that the people inhabiting the disputed territory, ought to be made parties, as their rights are affected. It might with the same reason be objected, that a treaty or compact settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void;

as the authority to make it was derived from the legislative power only. The same objection was overruled in Penn v. Baltimore; and in Poole v. Fleeger, this Court declared, that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of the law of nations,
*749 which would protect them in * their property: 1st. That grants by a government de facto, of parts of a disputed territory in its possession, are valid against the state which had the right. 12 Wh. 600–1. 2d. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property, are respected and sacred. 8 Wh. 589; 12 Wh. 535; 6 Peters, 712; 7 Peters, 867; 8 Peters, 445; 9 Peters, 133; 10 Peters, 330, 718, &c.

It has been contended, that this Court can not proceed in this cause, without some process and rule of decision prescribed appropriate to the case; but no question on process can arise on these pleadings; none is now necessary, as the defendant has appeared and plead, which plea in itself makes the first point in the cause, without any additional proceeding; that is whether the plea shall be allowed if sufficient in law to bar the complaint, or be overruled, as not being a bar in law, though true in fact. In this state of the case, it is that of the Nabob v. The East India Company, where the plea was overruled on that ground, whereby the defendant was put to an answer, assigning additional grounds, to sustain a motion to dismiss; or if the plea is allowed, the defendant must next prove the truth of the matters set up. When that is done, the Court must decide according to the law of equity, 1 Ves. sen. 446, 203, whether the agreement plead shall settle, or leave the boundary open to a settlement by our judgment, according to the law of nations, the charters from the crown under which both parties claim, as in 5 Wheat. 375; by the law of prescription, as claimed by the defendant, on the same principles which have been rules for the action of this Court in the case. 1 Ves. sen. 453; 9 Peters, 760.

It is further objected, that though the Court may render, they cannot execute a decree without an act of congress in aid.

In testing this objection by the common law, there can be difficulty in decreeing, as in Penn v. Baltimore mutatis mutandis. That the agreement is valid and binding between the parties; appointing commissioners to ascertain and mark the line therein designated; order their proceedings to be returned to the Court; 3 Dall. 412, note; decree that the parties should quietly hold according to the articles; that the citizens on each side of the line should be bound thereby, so far and no farther than the states could bind them by a compact, with the assent of congress, 11 Peters, 209; 1 Ves. sen. 455; 3 Ves. sen., supplement by Belt. 195, 197. Or if any difficulty should occur, do as declared in 1
*750 Ves. sen.; if the parties want * any thing more to be done, they must resort to another jurisdiction, which is appropriate to the cause of complaint, as the king's bench, or the king in council. Vide United States v. Peters, 5 Cranch, 115, 135, case of Olmstead; make the decree without prejudice to the (United States,) or any persons whom the parties could not bind. And in case any person should obstruct the execution of the agreement, the party to be at liberty, from time to time, to apply to the Court. 1 Ves. jr. 454; 3 Ves. sen. 195, 196. Or, as the only question is one of jurisdiction, which the Court will not divide, they will retain the bill, and direct the parties to a forum proper to decide collateral questions. 1 Ves. sen. 204, 205; 2 Ves. sen. 356, 357; 1 Ves. sen. 454; 5 Cranch, 115, 136. On the other hand, should the agreement not be held

binding, the Court will decree the boundary to be ascertained agreeable to the charters, according to the altered circumstances of the case; by which the boundary being established, the rights of the parties will be adjudicated, and the party in whom it is adjudged may enforce it by the process appropriate to the case, civilly or criminally, according to the laws of the state, in which the act which violates the right is committed. In ordinary cases of boundary, the functions of a court of equity consists in settling it by a final decree, defining and confirming it when run. Exceptions, as they arise, must be acted on according to the circumstances.

In England, right will be administered to a subject against the king, as a matter of grace; but not upon compulsion, not by writ, but petition to the chancellor, 1 Bl. Com. 243; for no writ or process can issue against the king, for the plain reason given in 4 Co. 55, a; 7 Com. Dig. by Day, 83; Prerog. D. 78; 3 Bl. Com. 255; "that the king cannot command himself." No execution goes out on a judgment or decree against him, on a monstrans de droit or petition of right, or traverse of an inquisition which had been taken in his favour; for this reason, that as the law gives him a prerogative for the benefit of his subjects, 1 Bl. Com. 255, he is presumed never to do a wrong, or refuse a right to a subject; he is presumed to have done the thing decreed, by decreeing in his courts that it shall be done; such decree is executed by the law as soon as it is rendered; and though process is made out to make the record complete, it is never taken from the office. Co. Ent. 196; 9 Co. 98, a; 7 D. C. D. 83. The party in whose favour a decree is made, for removing the lands of the king from the possession of a subject, or declaring a seizure unlawful and awarding a
*751 writ de libertate, is eo instanti, deemed to be in actual * possession thereof; so that a feoffment with livery of seisin, made before it is actually taken, is as valid as if made afterwards. Cro. El. 523; S. P. 463.

The same principle was adopted by the eminent jurists of the revolution, in the ninth article of the confederation, declaring that the sentence of the court, in the cases provided for, should be final and conclusive, and with the other proceedings in the case, be transmitted to congress, and lodged among their acts, for the security of the parties concerned, nothing further being deemed necessary. The adoption of this principle, was indeed a necessary effect of the revolution, which devolved on each state the prerogative of the king as he had held it in the colonies; 4 Wheat. 651; 8 Wheat. 584, 588; and now holds it within the realm of England; subject to the presumptions attached to it by the common law, which gave, and by which it must be exercised. This Court cannot presume that any state which holds prerogative rights for the good of its citizens, and by the constitution has agreed that those of any other state shall enjoy rights, privileges, and immunities in each, as its own do, would either do wrong, or deny right to a sister state or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority; when in a monarchy its fundamental law declares that such decree executes itself. When, too, the highest courts of a kingdom have most solemnly declared that when the king is a trustee, a court of chancery will enforce the execution of a trust by a royal trustee; 1 Ves. sen. 453; and that when a foreign king is a plaintiff in a court of equity, it can do complete justice; impose any terms it thinks proper; has him in his power, and completely under its control and jurisdiction; 2 Bligh. P. C. 57; we ought not to doubt as

to the course of a state of this Union; as a contrary one would endanger its peace, if not its existence. In the case of Olmstead, this Court expressed its opinion that if state legislatures may annul the judgments of the courts of the United States, and the rights thereby acquired, the constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws, by its own tribunal. So fatal a result must be deprecated by all; and the people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. 5 Pet. 115, 135.

The motion of the defendant is, therefore, overruled.

*752 * Mr. Chief Justice TANEY, Dissenting.

I dissent from the opinion of the Court, upon the motion to dismiss the bill. It has, I find, been the uniform practice in this Court, for the justices who differed from the Court on constitutional questions, to express their dissent. In conformity to this usage, I proceed to state briefly the principle on which I differ, but do not, in this stage of the proceedings, think it necessary to enter fully into the reasoning upon which my opinion is founded. The final hearing of the case, when all the facts are before the Court, would be a more fit occasion for examining various points stated in the opinion of the Court, in which I do not concur.

I do not doubt the power of this Court to hear and determine a controversy between states, or between individuals, in relation to the boundaries of the states, where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of judicial cognizance and decision, and which depends upon the true boundary line.

But the powers given to the courts of the United States by the constitution are judicial powers; and extend to those subjects, only, which are judicial in their character; and not to those which are political. And whether the suit is between states or between individuals, the matter sued for must be one which is properly the subject of judicial cognizance and control, in order to give jurisdiction to the Court to try and decide the rights of the parties to the suit.

The object of the bill filed by Rhode Island, as stated in the prayer, is as follows: That the northern boundary line between your complainants and the state of Massachusetts may, by the order and decree of this honourable Court, be ascertained and established, and that the rights of jurisdiction and sovereignty of your complainants to the whole tract of land, with the appurtenances mentioned, described, and granted, in and by the said charter or letters patent to the said colony of Rhode Island and Providence Plantations, hereinbefore set forth, and running on the north, an east and west line drawn three miles south of the waters of said Charles river, or of any or every part thereof, may be restored and confirmed to your complainants, and your complainants may be quieted in the full and free enjoyment of her jurisdiction and sovereignty over the same; and the title, jurisdiction, and sovereignty of the said state of Rhode Island and Providence Plantations over the same, be confirmed and established by the
*753 decree of this honourable Court; and that your complainants * may have such other and further relief in the premises as to this honourable Court shall seem meet, and consistent with equity and good conscience.

It appears from this statement of the object of the bill, that Rhode Island

claims no right of property in the soil of the territory in controversy. The title to the land is not in dispute between her and Massachusetts. The subject matter which Rhode Island seeks to recover from Massachusetts, in this suit, is, "sovereignty and jurisdiction," up to the boundary line described in her bill. And she desires to establish this line as the true boundary between the states, for the purpose of showing that she is entitled to recover from Massachusetts the sovereignty and jurisdiction which Massachusetts now holds over the territory in question. Sovereignty and jurisdiction are not matters of property; for the allegiance in the disputed territory cannot be a matter of property. Rhode Island, therefore, sues for political rights. They are the only matters in controversy, and the only things to be recovered; and if she succeeds in this suit, she will recover political rights over the territory in question, which are now withheld from her by Massachusetts.

Contests for rights of sovereignty and jurisdiction between states over any particular territory, are not, in my judgment, the subjects of judicial cognizance and control, to be recovered and enforced in an ordinary suit; and are, therefore, not within the grant of judicial power contained in the constitution.

In the case of New York v. Connecticut, 4 Dallas, 4, in the note, Chief Justice Ellsworth says, "To have the benefit of the agreement between the states, the defendants below, who are the settlers of New York, must apply to a court of equity, as well as the state herself; but in no case can a specific performance be decreed, unless there is a substantial right of soil, not a mere right of political jurisdiction, to be protected and enforced."

In the case of The Cherokee Nation v. State of Georgia, 5 Peters, 20, Chief Justice Marshall, in delivering the opinion of the Court, said: "That part of the bill which respects the land occupied by the Indians, and prays the aid of the Court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this Court, in a proper case, with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the legislation of Georgia, and to restrain the exer-
*754 tion of its physical force. The propriety of such an * interposition by the Court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question."

In the case before the Court, we are called on to protect and enforce the "mere political jurisdiction" of Rhode Island; and the bill of the complainant, in effect, asks us to "control the legislature of Massachusetts, and to restrain the exercise of its physical force" within the disputed territory. According to the opinions above referred to, these questions do not belong to the judicial department. This construction of the constitution is, in my judgment, the true one; and I therefore think the proceedings in this case ought to be dismissed for want of jurisdiction.

Mr. Justice BARBOUR said, that he concurred in the result of the opinion in this case. That this Court had jurisdiction to settle the disputed boundary between the two states, litigant before it. But he wished to be understood, as not adopting all the reasoning by which the Court had arrived at its conclusion.

Mr. Justice STORY did not sit in this case.

On consideration of the motion made by Mr. Webster on a prior day of the present term of this Court, to wit, on Monday the 15th day of January, A. D. 1838, to dismiss the complainant's bill filed in this case, for want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of, as against the said motion: It is now here ordered and adjudged, by this Court, that the said motion be, and the same is hereby overruled.

State of Massachusetts v. State of Rhode Island.

Supreme Court of the United States, 1838.

[12 *Peters*, 755.]

The state of Massachusetts, after having appeared to process issued against her, at the suit of the state of Rhode Island, on a bill filed for the settlement of boundary, and after having filed an answer and plea to the bill, and having failed in a motion to dismiss the bill for want of jurisdiction, was, on motion of her counsel, allowed to withdraw her appearance.

The case of The State of New York v. The State of New Jersey, 5 Peters, 287; Grayson v. The Commonwealth of Virginia, 3 Dall. 320; 1 Cond. Rep. 141; Chisholm's Executors v. The State of Georgia, 2 Dall. 419; 1 Cond. Rep. 6, cited.

In the case of The State of Rhode Island v. The State of Massachusetts, ante, page 657, the Court did not mean to put the jurisdiction of the Supreme Court on the ground that jurisdiction was assumed in consequence of the state of Massachusetts having appeared in that cause. It was only intended to say, that the appearance of the state superseded the necessity of considering the question, whether any and what course would have been adopted by the Court, if the state had not appeared; the Court did not mean to be understood, that the state had concluded herself, on the ground that she had voluntarily appeared; or, that if she had not appeared, the Court would not have assumed jurisdiction of the case. Being satisfied the Court had jurisdiction of the subject matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into Court, or what would be the course of proceeding, if the state declined to appear, became entirely unnecessary.

The practice seems to be well settled, that in suits against a state, if the state shall neglect to appear, on due service of process, no coercive measures will be taken to compel appearance, but the complainant will be allowed to proceed, ex parte.

Mr. Webster, in behalf of the State of Massachusetts, as her attorney and counsel in Court, moved the Court for leave to withdraw the plea filed in this case, on the part of the state of Massachusetts; and also the appearance which has been entered in this Court, for the said state.

Mr. Hazard, counsel for the state of Rhode Island, moved the Court for leave to withdraw the general replication to the defendant's plea, in bar and answer; and to amend the original bill.

Mr. Webster, in support of his motion, stated, that the governor of the state of Massachusetts had given him authority to represent the state; and to have it determined by the Court, whether it had jurisdiction of the case. This authority is dated November 30th, 1833. It directs him to object to the jurisdiction, and to defend the cause. The appearance of Massachusetts was voluntary;
*756 it was not * intended, by the appearance, to admit the validity of the proceeding, or the regularity of the process. It was not supposed that the state of Massachusetts would sustain any prejudice by this course. If the Court had no jurisdiction in the matter set out in the bill, the appearance of the state represented by him would not give it. It was thought most respectful to the Court, and proper in the cause, to file the plea with an intention to move the question of jurisdiction, at a subsequent time. Nothing has been done by the state of Massachusetts since; and this Court has determined not to dismiss the bill of the complainants.

The Court has given an opinion in favour of their jurisdiction in the case. In the course of the argument, it appeared, that certain difficulties, which might have existed in the case, had been removed by the appearance and plea; that jurisdiction was affirmed by the appearance and plea. It was said, if the question was on the bill only, the situation of the case might be different.

There is a great deal, from which it may be inferred that if Massachusetts had stood out, contumaciously, there would be no authority in the Court to proceed against her in this case. But it was not for that state to stand off, and put the Court at defiance. If, then, the state, by considerations of respect; if from a desire to have the question of jurisdiction settled, Massachusetts has appeared; this Court will not permit advantage to be taken of such an act, induced by such motives, and for such a purpose.

It is the desire of the counsel for the state of Massachusetts to withdraw the plea and appearance; and to place the case in the same situation as it would have been, had there not been process. If a fair inference may be made, that the state has appeared to the process of the Court, leave is asked to withdraw the appearance. It will be determined, hereafter, what course will be pursued by the state of Massachusetts.

Mr. Hazard, against the motion made by Mr. Webster, cited Knox & Crawford v. Summers & Thomas, 3 Cranch, 421, 496; 1 Cond. Rep. 607. In that case, it was decided, that the appearance of the party was a waiver of all the errors in the proceedings. In that case, one of the parties was out of the jurisdiction of the Court; and yet having appeared to the process, the right of the Court to proceed in the case could not be denied. The authority given by the governor of
*757 the state of Massachusetts, * which is of record in this case, is ample to all the purposes of this suit. It is an authority to appear and defend the case, and to object to the jurisdiction. Can the counsel of the state disappear? If they do, they can carry nothing with them. The argument which was submitted to the Court, on the motion to dismiss this cause, precludes this. They cannot disappear, and carry the plea with them.

The application is heterogeneous in its character. It is to withdraw the plea; this may be done, and the Court may allow it. It is also to withdraw the appearance; this is contradictory to the other application, and is made by the state of Massachusetts, denying its being bound to comply with the process, after having appeared to it.

Mr. Southard:

By the facts of the case, an answer is given to the motion on the part of the State of Massachusetts. A bill was filed on behalf of the state of Rhode

Island, and an application was made for process. After advisement, the case being held over for one year, the process was ordered, and was served on the state of Massachusetts. The state then gave a written authority to counsel to appear in the cause, to object to the jurisdiction, and to do whatever was necessary in the suit; and an appearance was entered.

After this, a plea was put in to the merits, and not a demurrer to the jurisdiction of the Court. The delay of the state of Rhode Island to proceed in the case, can have no effect on the cause. The question is, whether, after appearance, plea, and answer; the party can withdraw from the cause, and the cause stand as if no appearance had been entered.

The appearance of the counsel for the state of Massachusetts was general; and it was followed by an application for a continuance, and for leave to plead, answer or demur. At the following term in January, 1835, a plea and answer were filed. At the January term, 1836, an agreement was made by the counsel in the cause, that the complainant should file a replication within six months. This was done; and in 1837 the application of one of the counsel for the complainant for a continuance was opposed, and was argued by the counsel for the state of Massachusetts. Thus the whole action of the counsel for the defendant was such as a party fully before the court would adopt and pursue. There was no question made as to the jurisdiction. The appearance was not followed by a motion to dismiss the bill on that ground; nor was the general appearance explained by its being followed by such a motion. After all these proceedings
*758 on behalf * of the state of Massachusetts, and after the lapse of four years from the appearance of the state by the authority of the governor, giving full power to counsel to act in the cause, a motion to dismiss the cause, for want of jurisdiction, was made by the state of Massachusetts, and was argued. This motion having failed, the Court are now asked to consider the case as if Massachusetts had not appeared; and as if process had not been issued in the cause.

It appears that upon a statement of the case, no further reply to the application on the part of the state of Massachusetts is necessary. The purpose of it is to avoid the effect of the judgment of this Court on the motion to dismiss this bill, to withdraw from the cause. This could not be done in a private case; and why should it be allowed in a case between states?

The counsel seems to found his motion on something in the case, by which it would appear that if no appearance had been entered, the Court would not have taken jurisdiction of the cause; and desires, therefore, to put himself in the situation he would have been in had he not appeared. Suppose a demurrer to this jurisdiction had been put in, could the party after the question had been argued, and decided against the demurrer, move to dismiss the case for want of jurisdiction. This was never heard of.

Mr. Webster, in reply:

The authority to the counsel for the state of Massachusetts to appear in the cause, is no part of the record, and is no part of the case. The object of the motion is, that if any thing has been done by Massachusetts to her prejudice, she may have liberty to withdraw it. She has done it by mistake—process having been issued against her, she came in and appeared to it.

Is it considered that this Court has a right to issue process against a state; and that it is the duty of the State to obey the process? If this is so, there is an end of the motion. But if the right of the Court to issue process is not determined, and yet the process has been issued, and the state of Massachusetts has come in, and has appeared; although there was no right to issue the process, the state

should sustain no prejudice from having appeared for the purpose of having the question of jurisdiction settled. It is yet to be determined, whether the Court can issue process against a state; and Massachusetts is not to be entrapped by anything done by her, before this shall be decided. If the state of Massa-
*759 chusetts, from respect to the * Court, has appeared, she asks the Court to say that there is a right to issue process against a state, and she will obey; but if wrongfully issued, she asks that she shall not be affected by what she has done.

Mr. Justice THOMPSON delivered the opinion of the Court.

A motion has been made on the part of the state of Massachusetts, for leave to withdraw the plea filed on the part of that state; and also to withdraw the appearance heretofore entered for the state.

A motion has also been made on the part of Rhode Island, for leave to withdraw the general replication to the defendant's answer and plea in bar; and to amend the original bill filed in this case.

The motion on the part of the state of Massachusetts, to withdraw the appearance heretofore entered, seems to be founded on what is supposed to have fallen from the Court at the present term, in the opinion delivered upon the question of jurisdiction in this case. It is thought that opinion is open to the inference that jurisdiction is assumed, in consequence of the defendant's having appeared in the cause. We did not mean to put the jurisdiction of the Court upon that ground. It was only intended to say, that the appearance of the state, superseded the necessity of considering the question whether any and what course would have been adopted by the Court, if the State had not appeared. We certainly did not mean to be understood, that the state had concluded herself on the ground that she had voluntarily appeared; or that if she had not, we could not have assumed jurisdiction of the case. But being satisfied that we had jurisdiction of the subject matter of the bill, so far at least as respected the question of boundary, all inquiry as to the mode and manner in which the state was to be brought into Court, or what would be the course of proceeding if the state declined to appear, became entirely unnecessary. But as the question is now brought directly before us, it becomes necessary to dispose of it. We think, however, that the course of decision in this Court, does not leave us at liberty to consider this an open question.

In the case of the State of New Jersey v. The State of New York, 5 Peters, 287, this question was very fully examined by the Court, and the course of practice considered as settled by the former decisions of the Court, both before and after the amendment of the constitution; which declared, that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against a state by citizens of another state, or subjects of any
*760 * foreign state. This amendment did not affect suits by a state against another state; and the mode of proceeding in such suits, was not at all affected by that amendment.

We do not propose to enter into this question, any further than briefly to notice what the Court has already decided upon the practice in this respect. These cases were reviewed in the case referred to, of New Jersey v. New York; and the practice found to have been established by former decisions of the Court, as far as it went, was adopted. And the Court went a step farther, and declared

what would be the course of proceeding in a stage of the cause, beyond which former decisions had not found it necessary to prescribe such course.

The Court, in the case of New Jersey v. New York, commence the opinion by saying: "This is a bill filed for the purpose of ascertaining and settling the boundary between the two states." And this is precisely the question presented in the bill now before us. And it is added, that congress has passed no act for the special purpose of prescribing the mode of proceeding in suits instituted against a state.

The precise question was, therefore, presented, whether the existing legislation of congress was sufficient to enable the Court to proceed in such a case; without any special legislation for that purpose. And the Court observed, that at a very early period of our judicial history; suits were instituted in this Court, against states; and the questions concerning its jurisdiction were necessarily considered.

An examination of the acts of congress, in relation to process and proceedings, and the power of the Court to make and establish all necessary rules for conducting business in the Courts, is gone into, and considered sufficient to authorize process and proceedings against a state; and the Court adopted the practice prescribed in the case of Grayson v. The Commonwealth of Virginia, 3 Dall. 320, that when process in common law or in equity shall issue against a state, it shall be served on the governor, or chief executive magistrate, and the attorney general of the state. The Court, in that case, declined issuing a distringas, to compel the appearance of the state; and ordered, as a general rule, that if the defendant, on service of the subpœna, shall not appear at the return day therein, the complainant shall be at liberty to proceed ex parte. And the course of practice has since
*761 been to proceed ex parte, if the state does not appear. * And accordingly, in several cases, on the return of the process, orders have been entered, that unless the state appear by a given day, judgment by default will be entered. And further proceedings have been had in the causes. In the case of Chisholm's Executors v. The State of Georgia, 2 Dall, 419, judgment by default was entered, and a writ of inquiry awarded in February term, 1794. But the amendment of the constitution prevented its being executed. And in other cases, commissions have been taken out for the examination of witnesses.

By such proceedings, therefore, showing progressive stages in cases towards a final hearing, and in accordance with this course of practice; the Court, in the case of New Jersey v. New York, adopted the course prescribed by the general order made in the case of Grayson v. The Commonwealth of Virginia; and entered a rule, that the subpœna having been returned, executed sixty days before the return day thereof, and the defendant having failed to appear, it is decreed and ordered, that the complainant be at liberty to proceed ex parte; and that, unless the defendant, on being served with a copy of this decree, shall appear and answer the bill of the complainant, the Court will proceed to hear the cause on the part of the complainant, and decree on the matter of the said bill.

So that the practice seems to be well settled, that in suits against a state, if the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant, or plaintiff, will be allowed to proceed ex parte.

If, upon this view of the case, the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, leave will accordingly be given; and the state of Rhode Island may proced ex parte. And if the appearance is not withdrawn, as no testimony has been taken, we shall allow the parties

to withdraw or amend the pleadings; under such order as the Court shall hereafter make.

Mr. Justice BALDWIN dissented.

Mr. Justice STORY did not sit in this case.

On consideration of the motion made by Mr. Webster, on Saturday, *762 the 24th of February, A. D. 1838, for leave to withdraw the * plea filed on the part of the defendant, and the appearance heretofore entered for the defendant; and also of the motion made by Mr. Hazard, on the same day of the present term, for leave to withdraw the general replication to the defendant's answer and plea in bar, and to amend the original bill filed in this case, and of the arguments of counsel thereupon had, as well for the complainant as for the defendant; it is now here considered and ordered by the Court, that if the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, that leave be and the same is accordingly hereby given; and that the state of Rhode Island may proceed ex parte. But that, if the appearance be not withdrawn, that then, as no testimony has been taken, the parties be allowed to withdraw or amend the pleadings, under such order as the Court shall hereafter make in the premises.

State of Rhode Island v. State of Massachusetts.

Supreme Court of the United States, 1839.

[13 *Peters*, 23.]

The state of Rhode Island, on leave granted at January Term, 1838, to amend a bill previously filed by the state against the state of Massachusetts, amended the bill at this term, by inserting in it references to papers filed at the term of 1838. The state of Massachusetts was allowed until the term of 1840 to answer.

The rules which govern Courts of Equity as to the allowance of time for filing an answer and other proceedings in suits between individuals, will not be applied by the Supreme Court to controversies between states of the Union. The parties in such cases, must, in the nature of things, be incapable of acting with the promptness of an individual.

MR. SOUTHARD, for the complainants, stated that the state of Rhode Island, with the consent of the Court, obtained at last term, had amended the bill filed in this case; and he moved the Court for a rule on the State of Massachusetts to answer within a short time, so that the case might be disposed of during the term.

Mr. Webster stated, that, although not authorized to appear in the case, he thought it proper to say that the opinions of the Court delivered at the last term in this cause had been submitted to the government of Massachusetts. It was a short time before the adjournment of the legislature of the state that they were communicated to them. The subject will be again presented by the governor to the legislature, at the session now held; and it is expected that some action

upon it will take place. In the posture in which the case stood at the last term of this Court, the attorney general of the state of Massachusetts has not thought it proper to do any thing. The movements of such bodies, as the defendants in this case, are slow.

Mr. Hazard had no objection to an allowance of time to the defendants to answer. He had a strong impression that he had seen some proceedings of the legislature of Massachusetts, at its last session in 1838, by which the direction of this case was left to the counsel employed by the state. He did not think that the slow movements of such bodies should be allowed, when other parties are concerned. He desired that a time for the filing of an answer, by the State of Massachusetts, should be definitely fixed.

Mr. Chief Justice TANEY delivered the opinion of the Court.

A motion was made by the complainant on Saturday last for an order on the defendant to answer the amended bill of the complainant, on or before the 26th day of the present month of January. In deciding upon this motion it is necessary to refer to the orders of the Court heretofore passed in this case, and to see what steps have been taken under them.

At the last term leave was given to Rhode Island to withdraw the general replication filed in the case, and to amend the bill: the amendment
*24 to be made on or before the first Monday of August * last. At the same term, upon the motion of the counsel for Massachusetts, leave was granted to withdraw the plea which the defendant had filed, and also to strike out the appearance of Massachusetts to the suit.

Nothing has since been done by the defendant under this leave, for reasons which have been stated at the bar. And as the appearance of Massachusetts has not yet been withdrawn, and as Rhode Island has a right to the usual orders to enable that state to proceed in the suit, the court, in passing them must look to the condition of the case as it appears on the record, and consider Massachusetts as still in Court, and as appearing in the case.

When the motion was made at the last term to amend the bill, two documents which Rhode Island desired to introduce into the cause were filed with the motion; but the leave to amend was general, and not confined to the papers then filed. Nothing appears to have been done by the complainant until the second day of the present term, when the bill was amended, by inserting in it the proper allegations, in relation to the two papers above mentioned; and adding also certain interrogatories in relation to sundry matters charged in the bill, which the complainant prays that the defendant may be required to answer. The amendment, therefore, was not made until the second day of the present term. The defendant could not have answered until it was made; and, consequently, is not in default for not answering. The question now is, what time ought to be given?

From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern Courts of Equity in suits between individuals. In the last mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one too of so many years standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual. Agents must be employed, and much time may be required to search for historical

documents, and to arrange and collate them, for the purpose of presenting to the Court the true grounds of the defence. It is impossible for the Court to foresee, what additional inquiries and explanations may be found necessary, in consequence of the new allegations and documents introduced into the bill; and the new interrogatories as to the verity of various papers stated in the bill, which the defendant is now called upon to answer. And as the Court have received the amendment of the complainant at the present term, upon the leave granted at the last term, as here in before mentioned; we think that the same time should be given to the defendant to answer. The Court will, therefore, pass the following order.

*25 The bill heretofore filed by Rhode Island in this case, having been amended on the second day of the present term, it is ordered by * the Court, that Massachusetts be allowed until the first Monday in August next to elect whether that state will withdraw its appearance, pursuant to the leave granted at January term, 1838; and if the appearance of Massachusetts be withdrawn, within the time above mentioned, that Rhode Island be, thereupon, at liberty to proceed ex parte.

And if the appearance of Massachusetts shall not be withdrawn within the time above mentioned, it is then ordered, that the said state answer the amended bill of the complainant on or before the second day of January term, 1840.

The motion made by the complainant on Saturday, the 19th of the present month, is overruled. *January* 26, 1839.

Mr. Justice BALDWIN did not consider the state of Massachusetts before the Court; after what had passed at the last term, not considering Massachusetts before the Court, he had taken no part in the order now made by the Court.

State of Rhode Island and Providence Plantations, Complainant, v. State of Massachusetts, Defendant.[1]

Supreme Court of the United States, 1840.

[14 *Peters,* 210.]

By a rule of the Supreme Court, the practice of the English Courts of Chancery is the practice in the Courts of Equity of the United States. In England the party who puts in a plea, which is the subject of discussion, has the right to begin and conclude the argument. The same rule should prevail in the Courts of the United States, in Chancery cases.

In a case in which two sovereign states of the United States are litigating a question of boundary between them, in the Supreme Court of the United States, the Court have decided, that the rules and practice of the Court of Chancery should, substantially, govern in conducting the suit to a final issue. 12 Peters, 735, 739. The Court, on re-examining the subject, are fully satisfied with the decision.

In a controversy where two sovereign states are contesting the boundary between them, it is the duty of the Court to mould the rules of Chancery practice and pleading in such a manner as to bring the case to a final hearing on its merits. It is too important in its

[1] Mr. Justice STORY did not sit in this case.

character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading.

In ordinary cases between individuals, the Court of Chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. In a case in which two sovereign states are contesting a question of boundary, the most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength. If a plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of the claim on which he relies, the case ought not to be disposed of on such an issue. Undoubtedly, the defendant must have the full benefit of the defence which the plea discloses, but at the same time, the proceedings ought to be so ordered as to give the complainant a full hearing on the whole of his case.

According to the rules of pleading in the Chancery Courts, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent the recovery. If, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without a reference to the equity arising from any other facts stated in the bill.

If a plea upon argument is ruled to be sufficient in law to bar the recovery of the complainant, the Court of Chancery would, according to its uniform practice allow him to amend, and put in issue, by a proper replication, the truth of the facts stated in the plea. But in either case the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of those rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the Courts of Chancery in relation to pleas. In many cases, when they are not overruled, the Court will not permit them to have the full effect of a plea; and will, in some cases, leave to the defendant the benefit of it at the hearing: and, in others, will order it to stand for an answer, as, in the judgment of the Court, may best subserve the purposes of justice.

The state of Rhode Island, in a bill against the state of Massachusetts, for the settlement of the boundary between the states, had set forth certain facts on which she relied in support of her claim for the decision of the Supreme Court, that the boundary claimed by the state of Massachusetts was not the true line of division between the
*211 states, according * to their respective charters. To this bill, the state of Massachusetts put in a plea and answer; which the counsel for the state of Rhode Island deemed to be insufficient. On a question, whether the plea and answer were insufficient, the Court held—that as, if the Court proceeded to decide the case upon the plea, it must assume without any proof on either side, that the facts stated in the plea are correctly stated, and incorrectly set forth in the bill, then it would be deciding the case upon such an issue as would strike out the very gist of the complainant's case; and exclude the facts upon which the whole equity was founded, if the complainant has any. The Court held, that it would be unjust to the complainant not to give an opportunity of being heard according to the real state of the case between the parties; and to shut out from consideration the many facts on which he relied to maintain his suit.

It is a general rule, that a plea ought not to contain more defences than one. Various facts can never be pleaded in one plea; unless they are all conducive to the single point on which the defendant means to rest his defence.

The plea of the state of Massachusetts, after setting forth various proceedings which pre-

ceded and followed the execution of certain agreements with Rhode Island, conducing to show the obligatory and conclusive effect of those agreements upon both states, as an accord and compromise of a disputed right; proceeded to aver, that Massachusetts had occupied and exercised jurisdiction and sovereignty, according to the agreement, to this present time: and then sets up as a defence, that the state of Massachusetts had occupied and exercised jurisdiction over the territory from that time up to the present. The defendants then plead the agreements of 1710 and 1718, and unmolested possession from that time, in bar to the whole bill of the complainant. The Court held, that this plea is twofold: 1. An accord and compromise of a disputed right. 2. Prescription, or an unmolested possession from the time of the agreement. These two defences are entirely distinct and separate; and depend upon different principles. Here are two defences in the same plea, contrary to the established rules of pleading. The accord and compromise, and the title by prescription united in this plea, render it multifarious: and it ought to be overruled on this account.

THIS case was before the Court at January term, 1838. The state of Rhode Island, in 1832, had filed a bill against the state of Massachusetts, for the settlement of the boundary between the two states; to which bill Mr. Webster, at January term, 1834 appeared for the defendant; and on his motion the cause was continued until the following term, when a plea and answer were filed by him, as the counsel for Massachusetts. Before January term, 1837, the state of Rhode Island filed a replication to the plea and answer of the defendant; at the same time giving notice of a motion to withdraw the same.

At January term, 1838, the counsel for Massachusetts moved to dismiss the bill filed by the state of Rhode Island, on the ground that the Court had no jurisdiction of the cause.

This motion was argued by Mr. Austin, the attorney general of Massachusetts, and by Mr. Webster, for Massachusetts; and by Mr. Hazard and Mr. Southard, for the state of Rhode Island: and was overruled. 12 Peters, 657.

Afterwards, at the same term, Mr. Webster, on behalf of the State of Massachusetts, as her attorney and counsel in Court, moved for leave to withdraw the plea filed in the case on the part of Massachusetts; and also the appearance which had been entered for the state. Mr. Hazard moved for leave to withdraw the general replication to the plea of the defendant in bar, and to amend
*212 the original bill. * The Court, after argument ordered that if the counsel on behalf of Massachusetts shall elect to withdraw the appearance before entered, that leave be given for the same; and the state of Rhode Island may proceed ex parte. But, if the appearance were not withdrawn, that then, as no testimony has been taken, the parties be allowed to withdraw or amend the pleadings under such order as the Court may thereafter make. 12 Peters, 756.

At January term, 1839, Mr. Southard, on behalf of the state of Rhode Island, stated that the bill filed by the state had been amended; and moved that a rule be granted on the state of Massachusetts to answer in a short time, so that the cause might be disposed of during the term.

The Court, the bill of the state of Rhode Island having been amended the second day of the term, ordered that the state of Massachusetts should be allowed until the first Monday in August, 1839, to elect whether the state would withdraw its appearance, pursuant to the leave granted at January term, 1838; and if with-

drawn within that time, the state of Rhode Island should be, thereupon, at liberty to proceed ex parte. If the appearance of the state of Massachusetts should not be withdrawn before the first Monday in August 1839, the state to answer the amended bill before the second day of January, 1840. 13 Peters, 23.

The amendments made by the complainants in the bill were, chiefly, the insertion, by reference to reports of the commissioners of the colony of Massachusetts to the government of Massachusetts, while a colony, on the 13th of April, 1750 and on the 21st of February, 1792, to the legislature of the state of Massachusetts, appointed by an act of the commonwealth of Massachusetts, passed on the 8th day of March, 1791, "for ascertaining the boundary line between this commonwealth and the state of Rhode Island."

The report of April 13th, 1750, states, that the commissioners on the part of the colony of Massachusetts met the gentlemen appointed on behalf of the colony of Rhode Island, on the 10th of April, 1750, "and spent part of that and the next succeeding day in debating on said affair with those gentlemen;" and produced the agreement of 1710, 1711. "Sundry plans, &c. were offered to run and review with them the said line, but they refused to go, or join us herein, but insisted on our going with them to a certain place on Charles river, in Wrentham, from which they a few months since measured three miles south, and then extended a west line with the variation west, to the west bounds of that colony, as they claim as the west bounds of that colony, as they informed us; which bounds they claim as their north bounds; and is about four or five miles northward from Woodward and Saffrey's station." The report also states "that on the return of the commissioners to the place of meeting, the Rhode Island commissioners not having accompanied the Massachusetts commissioners to the station, they found them at the original place of meeting, who desired the commissioners would adjourn to a second meeting, which was assented to and
*213 the meeting fixed at * the same place, in October following, in case their respective governments consented thereto."

The second report was made by "The commissioners on the part of Massachusetts, to the legislature of that state, Feb. 21, 1792."

It is stated to be a report "that the commissioners appointed by an act of the legislature of the commonwealth of Massachusetts, passed on the 8th day of March, 1791, for ascertaining the boundary line between this commonwealth and the state of Rhode Island, have carefully attended the services assigned them, and take leave to report their doings."

The report states, "that on the 15th of August, 1791, we, by agreement, met the commissioners from the state of Rhode Island, at Wrentham, in this commonwealth, and after exchanging the powers under which we severally acted, we proceeded to discuss the subject that gave rise to our appointments, in the course of which, it appeared that the state of Rhode Island, from their construction of this expression, 'three miles south of Charles river, or of any and every part thereof,' in the ancient charter of the colony of Massachusetts, and as the south bounds of the same, claim near three miles north upon this commonwealth, than the present line of jurisdiction between the two governments; the commissioners of the commonwealth, from the circumstance that the branch, now called

Charles river, and from which the claim of the state of Rhode Island would run three miles south to ascertain the south boundary of the commonwealth, could not have been known by the name of Charles at the time of granting the Massachusetts charter in 1621; and from this line being ascertained and fixed at a different place by commissioners chosen by the colonies of Massachusetts and New Plymouth in 1667, at a time when the intentions of the grantor and grantees must have been known, are convinced that the claim of the state of Rhode Island is ill founded; but to complete, if possible, the intentions of our appointments, and that the disputes between the governments might be amicably adjusted, we united with the commissioners of the state of Rhode Island, in the agreement as in No. 1.

"In examining and comparing the charter of the two governments, granted by the successive kings of England, under which both claim, it appears that the first charter to the colony of Massachusetts was granted by King James the First, in 1621, and assigned a certain territory to that colony, bounded by an east and west line, which was to be three miles south of Charles river, or of any and every part thereof; the same expression is also used for limiting a part of the bounds of the old colony of Plymouth, and was probably copied from their charter into the Massachusetts, to prevent an interference of claims; the same line is adopted in the charter from King Charles the Second, to the colony of Rhode Island, granted in 1663, and is their northern boundary. The erection of a third government, referring to the same bounds, seems to have rendered it necessary for Plymouth and Massachusetts to ascertain their bounds; *214 accordingly those two governments, in 1664, appointed commissioners * to survey the most southern branch of the Charles river, and to lay off from thence three miles due south as their boundary line by charter; this was accordingly done, and they fixed upon a large tree, then known and since noted by the name of the Angle tree, as the north line of Plymouth, and the south line of Massachusetts. The knowledge and name of the place is preserved, and the commonwealth, in order to perpetuate it, have erected in the place of the tree, the remains of which are now to be seen, an handsome stone monument, which bears the name of Angle tree, and is explained by suitable inscriptions on the different faces of it. This the commissioners apprehend to have been the tree and original boundary, and is three miles south of the most southerly waters of Charles river. It does not appear that the colony of Rhode Island ever expressed any dissatisfaction respecting their northern boundary until 1716, or thereabouts, which finally ended in the appointment of commissioners by both governments in 1718, who fixed a new station about two miles north of the Angle tree, and which was called after the surveyors, 'Woodward and Saffrey's Station.' This place is well known, although no records of it have been preserved, or the proceedings of the commissioners ratified by either government; yet the line drawn from it has been practised upon as the line of jurisdiction between the governments from that to the present time. This commonwealth then lost two miles in width along the northern line of Rhode Island, and seems to have acquiesced in the agreement upon principles of generosity. The ancient charter of New Plymouth and Rhode Island were irregularly bounded on one another; the former as was supposed, by the shores of the Narraganset bay, the latter by three miles east of those shores; this interference of boundary, however, appears not to

have given any discontent, as the date of the charter of New Plymouth was prior to that of Rhode Island; and the peaceful jurisdiction to the shores of Narraganset bay, was enjoyed not only by the old colony of Plymouth, but by Massachusetts (after these two colonies were united by the charter of 1691,) down to the year 1730, at which time the colony of Rhode Island passed an act claiming the jurisdiction of the territory on their eastern boundary, granted to them, by charter, in this act and in the subsequent dispute and determination of the subject, not a claim, nor the intimation of one, but that their northern boundary was satisfactory, as established in 1718. In 1740, the King of Great Britain, who was then the sovereign of these states, appointed commissioners to hear and determine the dispute then existing between the governments, who, after hearing the parties, came to the determination as in No. 2, by which the extent of Rhode Island charter was allowed, and the jurisdiction of Massachusetts cut off from the shores of Narraganset bay. This judgment, unexpected by either party, was disapproved of by both, and they accordingly appealed to the king in council, where, however, it was ratified in 1746. As soon as this information was received by the colony of Rhode Island, they proceeded to ap-
*215 point their * commissioners, and assigned the time of meeting for them to begin running the lines that had thus been determined, and they gave information thereof to the governor of this their province; but the legislature not being convened until some time after the period affixed for the Rhode Island commissioners to begin the survey, they thought it unnecessary for them to join in the commission. These lines we perambulated in company with the commissioners of the state of Rhode Island, and excepting one or two stations between Providence and Bristol, which were well ascertained, we found that they had encroached upon this commonwealth from one-quarter to three-quarters of a mile in width. We were attended by suitable persons, approved by both parties, for making the necessary observations and surveys. Here, probably, all further dispute relative to boundary lines with the colony of Rhode Island would have forever ended, had it not have been for the rage of political parties at this time within that colony; one of which, to effect a decided majority, was extremely anxious for an extension of northern jurisdiction. Influenced by these motives, and perhaps in some measure, by their late success, they, in 1740, brought forward a new claim for extending their northern boundary beyond the line established in 1718; and to support that claim, they appointed commissioners in 1750, to examine what is now called Charles river, and from the most southern part of the same, to survey off three miles as the boundary of Massachusetts, agreeably to their charter. A plan of this survey was laid before us, and copy of it herewith presented. We have inserted our own survey of what we conceive to be the most southern part of Charles river, as intended by the charter, above Whiting's pond, and the position of the Angle tree. It may not be unnecessary to observe, that at the southern head of what we called Charles river, is a place known by a large chestnut tree; thence the stream descends to Whiting's pond, where it forms a considerable lake, and afterwards resuming its proper shape (and now known by the name of Mill river or brooke,) pursues its course in a northerly direction, till it joins that stream which is known by the name of Charles river, the confluence of the two streams six miles more northerly than the chestnut tree at the southern head of Charles; after peram-

bulating the bounds now practised upon, and ascertaining their deviations from the stations to which they ought to have been fixed, and learning the principles upon which Rhode Island supports her claims, and the extent of them, we adjourned to the 5th day of December last, then to meet at Providence, in the state of Rhode Island; at which time and place we met with the commissioners from Rhode Island, and after fully discussing the several claims, and endeavouring to conciliate the difference between the two states, agreeably to the powers of our commission, we were convinced that no agreement can be made at present with them, unless we yield a valuable territory, to which they have no claim, and which we hold not only by repeated charters, but by the agreement of the
*216 state of Rhode Island in 1718; and so far from its appearing * that encroachments have been made by this commonwealth on that state, that the contrary is notoriously the fact."

The counsel of the state of Massachusetts, after January term, 1839, and in conformity with the order and leave of the Court then given, filed a plea and answer to the amended bill of the state of Rhode Island. The plea and answer were the same, in all important particulars, as that originally filed at January term, 1834. The plea and answer conclude,—"And the defendant saith that there is no other matter or thing in the complainant's said bill of complaint contained, material for this defendant to make answer unto, and to which said defendant has not already pleaded and answered as aforesaid; all which matters and things pleaded and answered, as aforesaid, the defendant is ready to verify and maintain as the Court shall order. Wherefore said defendant prays to be hence dismissed, with costs."

All the matters in the bill, material in this case, and in the plea and answer, with the exception of the amendments given on pages 213–15, ante, are stated fully in the report of the case in 12 Peters, 657; and in the opinion of the Court, delivered at this term, by Chief Justice TANEY.

The case was before the Court, on the sufficiency of the plea and answer. It was argued by Mr. Hazard and Mr. Whipple, for the state of Rhode Island; and by Mr. Austin, attorney-general of Massachusetts, and Mr. Webster, for the defendant.

Before the argument was proceeded in, a question arose between the counsel in the case, on the right of the counsel for the complainants to begin and conclude the argument.

The Court held, that by a rule of the Court, the practice of the English Courts of Chancery is the practice in the Courts of Equity of the United States. On looking into the books of practice in the English Courts of Chancery, it appears that the party who puts in the plea which is the subject of discussion, has the right to begin and conclude the argument. The same rule should prevail in the Courts of the United States, in Chancery proceedings.

Mr. Austin for the state of Massachusetts.

The question before the Court is on the sufficiency of the plea in bar to the plaintiff's demand, both for discovery and relief. The plea is open to any just exception, either as to its form or substance; but as it purports to be an answer

or bar to the plaintiff's complaint, its sufficiency must materially depend on the structure of the bill in which that complaint is set forth. Any answer is sufficient to a bill which is so framed as to require none. The respondent contends that this opens, substantially, the whole merits of the case. Bogardus *vs.* Trinity Church, 4 Paige, 178.

The sufficiency of the plea is very different from the truth of it. For the purpose of the present inquiry, all its allegations are to be taken to be true. If
*217 the plaintiff denies any of them, he has another * mode of proceeding: it is understood also, that all allegations made in the bill, and denied by the plea, are, for this hearing, to be taken according to the plea, and not according to the statement of them in the bill: and it is admitted, that whatever is stated in the bill, and not controverted by the plea, is in this stage of the cause to be taken as true. If, under these circumstances, the plea leaves the plaintiff without a sufficient cause for discovery and relief, it has answered its office, and must be sustained. The case seems to the respondent in no material degree to differ from a general demurrer to the bill; except only that the allegations of the plea control those of the bill, and are admitted to be true pro hâc vice only.

Before the sufficiency of the plea can be ascertained, the matter to be answered must be examined and understood. The bill sets forth the plaintiff's title. It is of a form adopted, not very remotely, into the practice of Chancery; and requiring, or at least admitting, what the books call, without much propriety, an anomalous or irregular plea; thus applying terms to a plea, which in fact belong to the bill. It introduces, in anticipation, the subject matter of the defence, and attempts to avoid the effect of it, by special allegations. Substantially, the bill enumerates and recites the letters patent of the Council established at Plymouth in 1621: the deed of said council to Sir Henry Roswell and others, of 19th March, 1628: the first charter of Massachusetts, in 1629, by Charles I. From all these, one fact only is material, and that is not in dispute at all, viz. that Massachusetts became a colony of the British crown, at the settlement of it by the pilgrims; and that its southern boundary line first mentioned in the letters patent of 1621, and repeated in the words whenever occasion required, was by "all those landes and hereditaments whatsoever, lyeing within the space of three Englishe myles on the south parte of the saide River, called Charles river or any or every parte thereof."

It is obvious from these public papers, the effect of which is admitted by both parties, that the southern boundary of Massachusetts was described with sufficient accuracy; and the only matter to be done to fix it with perfect certainty, was to run on the earth, and through the then uninhabited wilderness, the line described in the charter.

The bill proceeds, after referring to the surrender of the letters patent of the council of Plymouth, in 1635, 17th June, and the planting and purchasing of what now is the territory of Rhode Island; which facts are not material or controverted; to recite the charter of the colony of Rhode Island, granted by Charles II. on the 8th July, 1643, whereby Rhode Island is bounded "northerly on the said south or southerly line of Massachusetts."

The bill states also, the dissolution of the first charter of Massachusetts, by the Court of Chancery in England, the new charter of William and Mary, in October 1691, re-establishing on this line, the ancient boundary in the same words, and the Declaration of Independence of the United States: documents not
*218 essential to any controverted * point in this suit; unless it be, as before was contended by the attorney general of Massachusetts, and now again respectfully insisted upon, that the Declaration of Independence repealed all these charters, and established the several former colonies in their new character of sovereign and independent states, by the line and boundary actually enjoyed and

possessed by them respectively, on the day of their political nativity, the 4th of July, 1776.

All these documents not controverted by the plea, and not to be denied with truth, are admitted with all their legitimate consequences. The bill then proceeds to state, that disputes had arisen, not in regard to any charter, or where the line ought to be drawn in conformity with the provision of those instruments; but where on the earth's surface, a line corresponding with the charters should be described. It sets forth the appointment of commissioners by each colony, "to settle the boundary line;" the meeting of those commissioners; and their unanimous agreement, certified under their hands on the 19th January, 1710, 1711; "that a stake set up by N. Woodward and S. Saffrey, in 1642, and since often renewed, in latitude 41° 55′, being three English miles distant southard from the southernmost part of Charles river, agreeably to the letters patent for the Massachusetts province, be accompted and allowed on both sides the commencement of the line," &c.

The commissioners having thus ascertained a point of beginning, and it being necessary to protract the line from that point which they did not do at that time; the bill recites the appointment of other commissioners by the two colonies, and their meeting at Rehoboth, on the 22d October, 1718, to protract the line; the fact that they reaffirmed the correctness of the place of beginning, ran the line as described by them, certified their proceedings under the hands and seals of a majority of their whole number, and of the delegation of each colony; and that the General Assembly of Rhode Island, passed a resolution, on the 26th October, 1718, ordering that the return be accepted, and placed to record in the colony books.

It seemed to the counsel of Massachusetts, that if the bill had stopped here, there would be nothing for the respondents to answer; because it is everywhere admitted in the bill, that the line thus run, is that to which Massachusetts laid claim before Rhode Island was in existence; the line to which Massachusetts was possessed, and over all territory north of which she was in the actual exercise of jurisdiction, when the charter of Rhode Island was granted; and that is all she had ever claimed, or now claims in that direction, by charter, possession, or title of any kind. It would seem, too, that both parties to this suit admitted the line by the charter; that they intended to describe on the earth the line so designated in the charter; that they did so by commissioners mutually appointed on two different occasions, at the interval of seven years; and that the plaintiff had accepted and recorded their proceedings, as satisfactory and conclusive, at the time, now more than one hundred and twenty years ago.

*219 * But the plaintiff having thus inserted the bar matter in his bill, proceeds to give his answer to it. It is obvious, therefore, that to this answer, and to so much of this answer only as is material to set aside the bar matter, is the respondent bound to reply. The plaintiff has furnished for the respondent a sufficient defence: he has set up a bar to his own further proceedings; and unless he removes the bar of his own procuring, the respondent has no need to make any reply. What then, is the allegation in the bill which professes to be sufficient to countervail an agreement of this sort; and of possession in conformity with such agreement for more than a century?

In the first place, it is apparent in the bill, and distinctly admitted by the learned counsel of Rhode Island, that no fraud is charged to anybody in these transactions; but it is alleged, that the parties acted under a mistake. It is averred, that the commissioners of Massachusetts, believing, no doubt, that the point which they designated as Woodward and Saffrey's Station, was three miles, and no more, from Charles river, affirmed to the Rhode Island commissioners,

that it was the proper place of beginning for the line, and that the Rhode Island commissioners, taking the word of the Massachusetts commissioners for true, or searching for themselves and coming to the same conclusion, or examining the map then before them, made by Woodward and Saffrey, were of the same opinion, and jumped together in judgment: and that the commissioners of the two colonies, in 1718, in running out the line, were actuated by the same means, and established the line, which, as ever before, so ever since, has been the actual line of division between these neighbouring sovereignties. And that in all this, without fraud or misrepresentation, there is, nevertheless, a fatal mistake.

It is admitted that all parties acquiesced in the doings of the commissioners until 1749, more than thirty years; when Rhode Island discovered, as is alleged, that the stake of Woodward and Saffrey was more than three miles, viz., seven miles from Charles river; and that the Rhode Island commissioners, and the Rhode Island legislature, acting under this mistake, are not bound by the treaty, compromise, arbitration, or award, and have now a right to claim for that cause, by the intervention of this honourable Court, to set aside the conventions of 1710 and 1718, and re-examine and adjust the boundary on their present information; and by the letter of their ancient charters, as they are now understood by the plaintiff.

The residue of the bill recites the ex parte proceedings of Rhode Island to determine the true line, independent of the agreements of 1710 and 1718, and the various attempts made to induce Massachusetts to re-open the matter; all which were ineffectual, as is confessed by the fact, distinctly admitted, that for all time since Massachusetts has been a government, colonial, provincial, federative, or sovereign, she has had the actual, undisturbed, quiet possession
*220 * and occupation, jurisdiction and control of and over the premises in dispute.

Now it seems to the counsel of the respondent, that to this complaint, thus set forth, a demurrer might safely have been filed; and that to a bill to which a demurrer would be sustained, any plea or answer must be deemed sufficient. Such bill contains its own answer. It incorporates the defence: and whatever else may be said of the plea, it cannot be deemed inadequate or insufficient for the defence.

But the respondent is unwilling that the record should contain only the plaintiff's coloured view of the treaty, covenant, or arbitrament, entered into in 1710 and 1718. However safe it would be to admit such a mistake as the plaintiff alleges, yet the facts afford a stronger ground; and the respondent avails himself of it.

The plea, therefore, to the substance of which the attention of the Court is now solicited; takes from the plaintiff's bill the whole subject of the proceedings of the commissioners in 1710 and 1718, and treating of each of them severally, avers that the "whole real and true merits of said complainant's supposed cause or causes of action, claims, grievances, and complaints, set forth and supposed in said bill of complaint, were fully heard, tried, and determined, in the hearing and by the judgment of said commissioners; that the agreement was fair, legal, and binding between the parties, and was, in all particulars, a valid and effectual settlement of the matter in controversy; and was had and made without covin, fraud, or misrepresentation, and with a full and equal knowledge of all circumstances by both parties; and that the same is still in full force, in no way waived, abandoned, or relinquished; that the station called Woodward and Saffrey's station, was then well known, the place where it was fixed of common notoriety, and the line run therefrom, as aforesaid, capable

of being discovered and renewed; that the said defendant has held and possessed, occupied and enjoyed the land, property, and jurisdiction, according to said station and line running therefrom, from the date of said agreement to the present time, without hinderance or molestation."

It is certainly true, that the plea does not undertake to say that the Woodward and Saffrey station is three miles southwardly of Charles river, and no more. It does not put in issue, whether now a revision of the line, according to the charter, would describe the same place.

If the plans exhibited in this case, either by Rhode Island or Massachusetts, are correct, no revision could alter the line; for it is clearly within three miles of one of the branches of that river; and the only question would be, whether the charter, by the terms in it, viz., "on the south part of Charles river, or of any or every part thereof," meant to include one of the forks as part of the river, or not. But the geographical and historical facts, which are notorious, and, *221 of course, to be taken notice of by the Court (one of which * both these maps prove,) are important in the case. Charles river had never been explored in 1642 by any European, and its borders were occupied only by savages. Woodward and Saffrey went there to determine the river; the offset of three miles; and the line of boundary. It is very immaterial how they determined it.

The stream called Charles river acquired that name not from nature, but man. When and what was called Charles, became Charles; what was called part of the river, was, for all human purposes, thenceforth known and notorious as part of the river. They fixed their station within three miles of water flowing into the main stream. They found or they called this water Charles river. If it was unquestioned, it must have been conclusive. If it was questioned or questionable, if after Rhode Island came into existence, and in 1710, near seventy years after the naming of this water by Woodward and Saffrey, it was brought into question by Rhode Island, it was then a proper subject of settlement, compromise, and agreement for the commissioners; and their decision settled the matter conclusively for all after time. It was the very question they met to settle; and their opinion, judgment, and award, made it what they determined it to be.

The respondent contends, first, that it is not necessary to the sufficiency of the plea, to controvert or notice in any way the suggestion of a mistake.

Secondly, That mistake or no mistake are substantially and sufficiently put in issue by the plea, so that the plaintiff may join the issue there tendered, if he pleases.

On the first point, it is respectfully submitted, that where a party alleges a proceeding to be had under a mistake of fact or law, and sets forth the circumstances in which he supposes the mistake to exist, if by the circumstances so stated it is apparent that there was no mistake, the allegation may be treated as a nullity. The legal inference from the matter so stated, and not the term applied to it, must regulate the pleading of the adverse party, and the decision of the Court. Story Eq. Pl. § 680, and note.

The plaintiff sets forth his circumstances of supposed mistake. They are these: Massachusetts being in possession of a line of boundary, Rhode Island complains, and proposes a joint commission to settle it. Commissioners meet. Governor Dudley, on the part of Massachusetts, tells Lieutenant Governor Jenckes, of Rhode Island, that the true point is the Woodward and Saffrey station. Governor Jenckes, either knowing that fact himself, before; or in some other way being convinced, agrees to it, and signs an award fixing that station as the point of beginning. Nine years after, the same thing is repeated by other

commissioners, and the whole line run from that point. The bill does not allege that the Rhode Island commissioner believed the station to be the true one, because Governor Dudley told him so; but avers that he did believe the fact, which being the very thing he was commissioned to ascertain, it must, at
*222 * this distant day be supposed, that he believed it on sufficient and satisfactory examination.

It is obvious that this, by the plaintiff's own showing, is no mistake, as that term is understood in equity.

When negotiators meet to decide a question, it is impossible but that one must make an assertion to the other, which, after the lapse of an hundred years, the generation of the then present period may deem wrong in point of fact. So of arbitrators or referees. If a decision that should appear to the heirs of a remote ancestor to be wrong, could be reinvestigated on the allegation of the losing party, that the verdict or judgment was a mistake, (which every losing litigant is ready enough to make,) there could be no end to law suits: and the decision which this Court may pronounce in this case, may, on the same principle, be revived an hundred years hence, by a suggestion that there was a mistake in the forming of it.

It is impossible that any declaration made by Governor Dudley one hundred and thirty years ago, could be known now; and the suggestion of the plaintiff, in this regard, must be a mere fancy-sketch. The allegation, if made, could be only the declaration of an opinion. Gov. Dudley died in 1720, aged seventy-three years. 1 Holmes' Annals, 525.

The fact referred to occurred in 1642, five or six years before he was born.

The statement of an opinion is no misrepresentation. Scott *vs.* Hanson, 1 Simons's Rep. 13. Such a statement is not calculated to deceive, but rather to put the opposite party on his guard. Trower *vs.* Newcomb, 3 Merivale, 704. Ignorance, which might have been remedied by due diligence and inquiry, is no cause for relief. Perry *vs.* Martin, 4 Johns. Chan. R. 566. And Lord Loughborough has emphatically said, ignorance is not mistake.

If the Rhode Island commissioner acted on such representation, supposing it was made, and if it was false, yet his action is not to be considered as founded in a mistake, as that term is understood in equity; because the relations of the two commissioners was not such as to induce one to place a known trust in the other; but the contrary. Fox *vs.* Mackrith, 2 Bro. Ch. Ca. 420. Smith *vs.* The Bank of Scotland, 1 Dow. Parl. C. 272. Laidlaw *vs.* Organ, 2 Wheat. 178; 195. Evans *vs.* Bucknell, 6 Ves. Jr. 173; 182–192. Such representation would not vitiate a sale; a fortiori, not an arbitrament. Fenton *vs.* Brown, 16 Ves. 144. 2 Kent's Lectures, 2d ed. 484, 485.

If there was no false representation: if the Rhode Island commissioner believed a fact, the truth of which it was his special duty to investigate, and which he had the means of investigating: and all this appears by the plaintiff's bill, the judgment and the award was not mistake, but conviction. The plaintiff, by calling it a mistake, cannot change the rule of pleading or of equity; and it may be treated as a misnomer or a nullity.

*223 * In further considering this allegation of mistake, the great questions arise, in what relation or capacity did the present plaintiff and respondent stand to each other at that time? What was the capacity of the commissioners by whom the line was run? and what is the law of a case so situated?

If the parties now before the Court stand here as common suitors, corporations, or individuals, controverting the boundary of an estate, and these commissioners are referees or arbitrators mutually chosen to decide the contro-

versy; then the rules regulating the proceedings of an arbitrament and award at common law or equity, may well enough be invoked, to determine the question before the Court. But in this view, the mistake of law or fact, the wrong judgment and erroneous decision of arbitrators, do not authorize the re-opening and re-examining their proceedings. Knox *vs.* Symonds, 1 Ves. Jr. 369. South Sea Co. *vs.* Bumstead, 2 Eq. Pl. Ab. 8. Shephard *vs.* Merrell, 2 Johns Ch. R. 276. Delver *vs.* Barnes, 1 Taunt. 48. 51. Morgan *vs.* Mathews, 2 Ves. Jr. 18. Jones *vs.* Bennett, 1 Bro. Par. Ca. 411. 28. Ching *vs.* Ching, 6 Ves. 282. Annersly *vs.* Goff, Kyd on Awards, 351. Mitford's Plead. in Eq. by Jeremy, 131, 132. Lyon *vs.* Richmond, 2 Johns. Ch. R. 51. Kleine *vs.* Catara, 2 Gal. 61. Dick *v.* Mulligan, 2 Ves. 23. Young *vs.* Walter, 9 Ves. 464. Wood *vs.* Griffith, 1 Swans. 55. Auriol *vs.* Smith, 1 Turner and Russ. 125. Goodwin *vs.* Sayres, 2 Jacob and Walker's Rep. 249.

These cases go the whole length of establishing the position ,that the mistake of the arbitrator on a matter of fact or law referred to him, cannot be inquired into; or rather, that his judgment and opinion make the rule, and there is no authority above him competent to say that his decision is a mistake. Lord Commissioner Wilson, in one of the cases (Morgan *vs.* Mathews) says, "It would be a melancholy thing if, because we differ from arbitrators in point of fact, we should set aside awards." And Lord Chancellor Eldon, in Ching *vs.* Ching, states in strong terms, "If a question of law is referred to an arbitrator, he must decide it; and though he decides wrong, you cannot help it."

The case is different where arbitrators, conscious of a mistake, desire to rectify it; because, in that position, the supposed decision is not their judgment; and this consideration reconciles any cases of a seemingly different character from those above cited.

This supposed mistake may, however, even on the strict rules of equity practice, be passed without notice in the plea, because the allegation of the plaintiff renders it invalid by lapse of time. It is of ancient date, and from that circumstance impossible to be ascertained; or if ascertained, to have any present operation.

Courts of Equity, by their own rules, independent of any statute of limitations, give great effect to length of time; and they refer frequently to statutes of limitations, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular demand. Beckford *vs.* Wade, 17 Vesey, Jr. 2 Scho. and Lefroy, 626.
*224 Paul *vs.* McNamara, * 14 Vesey, Jr. 91. Gifford *vs.* Hort. 1 Scho. and Lefroy, 406. Bogardus *vs.* Trinity Church, 4 Paige, 178.

Now, though the question before the Court assumes to be one of pleading, and not of equity, yet it is maintained by the respondent, that a plea is sufficient which leaves no material matter unanswered; that what is not answered redounds to the benefit of the plaintiff; and if this mistake is not answered, it may count for him valeat quantum. But if it is in itself immaterial, and of stale character, it may be passed over without notice, because it can in no shape make out a case for the plaintiff.

Secondly, the respondent contends, "that all which the strictest rule of equity pleading requires in this case is met by the allegation in the plea, that the "said agreement was fair, legal, and binding between the parties, without covin, fraud, or misrepresentation, and with a full and equal knowledge of all circumstances by both parties." This allegation is not now controverted: and it seems to the respondent's counsel impossible to say, that with a full and equal knowledge of both parties, their unanimous determination of the question submitted to them could be a mistake relievable in equity.

To the form of the plea no exception is taken by the learned counsel for the plaintiff; but he contends, that it is novel and insufficient in this, that it pleads possession as a bar, and not title. To an action at common law or at equity, where the usual statute of limitations applied, this exception might, if well taken in point of fact, cause some hesitation. But it is not founded in a correct estimation of the character of the plea. The respondent, in his plea in bar, asserts his title to the territory in dispute, and derives it from the joint effect of the agreements of 1710 and 1718, and possession under them forever. It may be, that under the peculiar circumstances of this case, neither the agreement, if made against the letter of the charters; nor possession, if held adversely and without consent, could sustain the respondent's claim: nor is it material to inquire how this would be, because in truth and fact the title of the respondent rests on neither one of those pillars alone, but on both; upholding, strengthening, confirming, and supporting each other, and forming together a foundation of irresistible strength. They have not been separated for more than a century; and ought not to be separated now in the matter before the Court. The true character of the plea is, title derived in part from two sources, and concentrating into one point, that of indefeasible right. 1 Chitty's Pleading, 512, and the cases there collected.

But before this plea can be overruled for any technical exception of this or any other sort, the Court will come to the consideration of a much more important or interesting question than yet has been presented; full of novelty and grandeur, and suited to the cause, the parties, and the Court.

The question thus presented is this: By what code of laws, by what forms of proceeding, by what principles of judicial construction, is this controversy
*225 to be settled? It is impossible not to perceive, * that the case before the Court is not one of ordinary judicial cognisance. It is not the boundary of a farm or a water lot that is in dispute, but the limit of a nation. It is not a question of ownership in the soil that is presented, but of jurisdiction over a territory and its inhabitants. The parties, too, are not ordinary suitors in a Court of justice: they are states, called by the plaintiff "sovereign states;" and standing in that relation to each other, before this high tribunal, which, like the ancient Areopagus, is to adjudicate on the tranquillity and peace of mankind.

The Court, on solemn consideration, has decided, that on these great interests of territorial jurisdiction and state sovereignty, and on the transfer of the allegiance of 5,000 people from one civil government to another, essentially different in many of its institutions, customs, and laws, it has a constitutional power to pronounce judgment and decree justice. Be it so: this point is not now to be controverted. But whence does the Court derive this power? Not from its ordinary judicial authority; not as a branch of that prerogative by which it is to decide "cases in law and equity;" but by a special provision of the constitution, for the administering of which no forms are provided; a power above and beyond the reach of any other judicial tribunal in the world; wholly without precedent in the principles of the civil, the canon, or the common law; and vesting in this high tribunal a discretion and authority, which yet has been limited by no legislation of congress, nor by any rules or acts of its own.

In a case where "the file affords no precedent," and there is neither common nor statute law to guide the proceedings of the Court, the counsel of the respondent respectfully contends, that the case brings with it into this tribunal its own law, in the principles of an elevated and perfect justice, unfettered—as in their nature they are incapable of being fettered—by technical subtleties and petty forms. It stands upon those great and fundamental doctrines of international law, which, by the common consent of mankind, are the basis of the intercourse of the civilized world.

The high demand of the plaintiff is, that your honours will "restore and confirm to him his violated rights of jurisdiction and sovereignty." These are rights which no private party ever could possess, and over which no other judicial tribunal ever held jurisdiction. The light which is to guide the conscience of the Court in this new field, comes not from books of pleading, or reports of adjudicated cases between citizens or subjects. Such matters belong not to them. It is to be found only in the source of eternal justice, as it comes from intelligence and truth.

The case, examined in the character which it thus properly assumes, however important in principle, is one of easy solution.

The parties to the suit were once colonies of Great Britain. The relation thus sustained is matter of public history, and familiar to the Court. Nominally in a state of vassalage, they were in reality free; and professing a formal *226 allegiance to the British crown, actually * assumed and exercised the prerogatives of sovereignty. They made war and peace; coined money; entered into confederacies; and made treaties of alliance, offensive and defensive, with each other. The proceedings in 1710 terminated in a treaty of boundary, differing in nothing from that of 1783 between Great Britain and the United States, except in extent. No earthly power but the contracting parties ever attempted to interfere with it. It was made by negotiators of each party, with unlimited powers to compromise and settle the boundary. The terms are plain and incontrovertible. The treaty, thus made, established the station of Woodward and Saffrey in latitude 41° 55′, to be three English miles from Charles river, and "that, agreeable to the letters patent for the Massachusetts province, it be accompted and allowed on both sides the commencement of the line between Massachusetts and the colony of Rhode Island."

It is obvious from the whole of the plaintiff's bill, that this treaty only confirmed and established what had always before been admitted in point of fact.

In 1718 another treaty was negotiated, confirming the treaty of 1710, and more fully carrying it into effect.

These titles to the territory, founded on the solemn faith of two formal treaties, under and by force of which the respondent has always held "unmolested possession," are presented to this Court, thus held over sovereigns, on a question exclusively of international law, as a bar in equity and justice to further molestation and disturbance.

Whether, being negotiated between colonies, they are entitled by the law of nations, to be termed treaties, or only conventions, agreements, or pactions, they are by that law equally sacred. Vattel, 193, § 154, 155; 227, § 215.

Why are they not binding? The suggestion in the plaintiff's bill, that they were not ratified by the mother country, is a poor attempt at self-stultification. They needed no ratification. They were not repudiated by Great Britain; and, like all acts of the colonies, were in force until disallowed. If it were otherwise, it would be more consistent with the high character of our esteemed fellow-citizens of Rhode Island to imitate the Roman honour of the Consul Fabius Maximus, who, when the senate would not ratify his agreement with the enemy, sold his private property to make good his word: or that other Consul, Postumius, who, because the senate would not confirm his treaty with the Samnites, adjudged that he himself and his colleagues should be delivered into their hands.

The answer to all this by Rhode Island is, that the negotiators made a mistake. To this the reply is, that it is denied in the plea. But if the allegation be admitted, the mistake of negotiators never was, and on principle never can be, a just cause for violating the stipulations of a treaty. Of this principle the

diplomatic history of the United States is full of examples, and conforms to the diplomacy of civilized Europe.

*227 * Possession, or as it is called in books on international law, usucaption, for a long period of time, is the best evidence of a national right. Vattel, 187. 191, &c.

The possession of Massachusetts began before Rhode Island was created, and has never been interrupted for a day. This is an insuperable bar to the long delayed claim of the plaintiff. Of itself, it is invincible. The only answer to it now, is, that it is joined with another title, equally strong, which two are not to be united in the same plea. One reply to this objection has already been given; but there is a stronger one in the present aspect of the case. Under the law of nations, forms cannot obstruct justice. There are no technicalities, and no Common Pleas practice, in a Congress of nations; nor can any be admitted before this august tribunal, sitting under its high constitutional commission, to settle the rights of sovereignties, and to administer justice in political controversies between independent states.

Mr. Hazard, with whom was Mr. Whipple, for the state of Rhode Island.

I had endeavoured to prepare myself to argue the questions of law which the state of the pleadings presented to the Court; intending to confine myself strictly to those questions, that I might not trespass upon the time or patience of the Court. I did not anticipate, for I could not believe that the defendant's counsel would, himself, bring into view the merits of the main cause, in a trial upon his own plea in bar to those merits, interposed to prevent their being put in issue or tried. But, finding myself mistaken in this, it becomes necessary for me to pay some attention to the statements made by the counsel, lest he should consider them as being acquiesced in.

The facts stated in the plaintiff's bill, we think, constitute a good cause for the relief asked for. And we believe that we can prove those facts. The defendant, while, by his pleading, he excludes those facts from the issue and from trial, himself makes statements which we are not permitted to disprove; because they also are excluded by him from the issue and from trial. But there is this distinction between the statements made by the respective parties. The defendant has no right to state facts which he refuses to put in issue, or have tried. But, it would not be departing from the merits of the law question of the sufficiency of the plea in bar, for the plaintiff to show the material facts he would be able to prove, if not precluded by the defects of the plea. At present, however, I ask leave to appeal to facts, only so far as may be necessary to correct the erroneous statements made by the defendant.

I understood the counsel to say, that he resorted to the merits of the cause, and to one of the charges in our bill, for the purpose of showing that, at the time of the Roxbury agreement of 1710, 1711, there was a serious misunderstanding between the parties as to what was the most southerly part of Charles river, at the distance of three English miles south from which the southern

*228 boundary * line of Massachusetts was to be run east and west, agreeably to her charter; Rhode Island claiming to measure from Charles river proper, as it is now known; while Massachusetts insisted upon taking the head of a brook, called Jack's Pasture brook, or Mill brook, as the most southerly part of Charles river; and that this misunderstanding led to a compromise which was effected by the agreement at Roxbury. But the charge referred to negatives instead of countenancing this supposition. For it speaks of the pretence about Jack's Pasture brook, as one that is set up against the present claim of Rhode Island, which was made upon Massachusetts, in 1748; and has since been adhered to and prosecuted to the present time. But besides this, it is plain from

the reports of all the committees from 1710, 1711, and 1718, to 1791, that Mill brook was never thought of as in any way affecting the question of the boundary line, until the idea occurred to, and was for the first time, started by the Massachusetts committee of that last year, 1791. In the old reports of 1710, 1711, and 1718, no mention is made of any such brook; and it is not likely that the committees knew of its existence, for they took no view even of Charles river itself. They adopted the supposed Woodward and Saffrey station, because set up (they said) by skilful and approved artists, so far back as 1642; and believed to be on the true charter line. The same ground was taken by the Massachusetts committee of 1750, which was appointed, as the report shows, to run the line from the pretended Woodward and Saffrey stake. Not to ascertain what was Charles river, nor where the true boundary line was or ought to be, nor to run any such line. But, after the Rhode Island committee of 1750 had by actual view and survey ascertained the true charter line, and found that the line chalked out by Massachusetts for herself, was really eight, instead of three miles off from Charles river, and gave to that colony a part of the Rhode Island territory, averaging five miles in breadth by twenty-three in length; it would not do any longer to rest upon the naked authority of the imaginary Woodward and Saffrey stake, which had been acquiesced in, only because it had been asserted to be on the true line, and nothing to the contrary was known. The Massachusetts committee of 1791, therefore, cast about for something to give a colour of pretence for adhering to the old position, after it had been thus exposed. And in their difficulty, they quit Charles river, and run up into Mill brook, and through Whiting's pond, two and a half miles off, and then into another brook still farther on. Their report (annexed to the bill) shows this. After mentioning that the Rhode Island committee measured from Charles river as it now is, they say, "we have inserted our own survey of what we conceive to be the most southern part of Charles river," &c. And the report then tells how they made the matter out, as has just been related. Here it appears, that the pretence about Mill brook was a new one, and their own. They do not speak of it as having ever before been thought of, but as a conception of their own.

*229 The allegation, therefore, that there had been a dispute about this * brook, in 1710, 1711, which had led to a compromise then made, is wholly unsupported and unfounded. Indeed, the idea that Charles river ever could have been mistaken for Mill brook, or the brook for the river, or that they ever could have been identified and taken for one and the same, appears to me to be preposterous. Charles river had its present name, the only name it has ever had, even before the first settlement was made by the Massachusetts colony. It was so named in the first charter, by King Charles I., to that colony, in 1629. Whoever first went there and saw it, marked it as one of the great natural boundaries for the colony. A boundary definite and permanent, about which there could be no uncertainty or dispute. Having the broad river before their eyes, although in the wilderness, and not far to be seen, it is not likely that they spied out the particular tributary brook, much less that they groped their way through the bushes and swamps, to see where it came from, that they might honour it; Whiting's pond, Jack's Pasture brook, and all, up to the big chestnut tree, with the name of the king.

The counsel thinks that he sees evidence of a compromise in the clause of the Roxbury agreement, leaving five thousand, or the land within one mile north, to the inhabitants of Providence or others. But the committee assigned their own, and a different reason, for that clause; which was, that some of the inhabitants of Providence had laid out lots there. But it is not pretended that any notice was taken of that clause by the government of Rhode Island, or that it was ever acted upon by either government. Again, if the Roxbury com-

mittee had been making a compromise instead of ascertaining and fixing the charter line, their report would have shown it, and the grounds of it. They were bound to show this; for their respective legislatures had a right to know what they did, and why they did it. Now, the report of this committee, on the face of it, negatives the supposition of a compromise. It professes to go by the charters; and that the station agreed upon was on the true charter line, and no more than three English miles from Charles river. And so the General Assembly of Rhode Island was led to believe; and not that any thing was done by way of compromise. A singular compromise it would have been, certainly, had it been so intended; by which Massachusetts took to herself five miles of the Rhode Island territory, and in consideration thereof, allowed the inhabitants of Providence or others, to retain the land within one mile, but under her jurisdiction. Whether that territory does or does not justly belong to Rhode Island, by her charter, and equally so by the charter of Massachusetts, is the question which constitutes the merits of the main cause; and can only be tried when those merits are put in issue.

Some further disclosures are made in the report of the Massachusetts committee of 1791, which ought not to be overlooked. Having mentioned, that old Plymouth colony and Rhode Island had the same northern boundary on Massachusetts, the report says: "The erection of a third government, referring
*230 to the same bounds * (the Rhode Island charter of 1663 had then just been granted,) seems to have rendered it necessary for Plymouth and Massachusetts to ascertain their bounds." Accordingly commissioners were then (in 1664,) appointed, who "fixed upon a large tree, called the Angle tree, as the north line of Plymouth and the south line of Massachusetts," etc. "This, (says the report,) the commissioners apprehend to have been the true and original boundary; and is three miles south of the most southerly part of Charles river." They then mention the appointment of commissioners by Massachusetts and Rhode Island, in 1718, "who fixed a new station, about two miles north of the angle tree," called Woodward and Saffrey station. "This commonwealth then lost two miles in width along the northern line of Rhode Island."

Thus these Massachusetts commissioners themselves falsify the pretended Woodward and Saffrey station, which they call a "new station," fixed upon in 1718. And it is a striking fact, that although the settlement with Plymouth was only twenty-two years after the date now assigned to the Woodward and Saffrey station, yet, in that settlement, not a word was said about any such station. The plain inference is, either that none such existed, or that Massachusetts concealed it for the purpose of gaining two miles more upon Plymouth; and that with a view to fixing a line for Rhode Island, without giving Rhode Island any notice of her doings, or allowing her to be a party to them. The probability is, that no such station was ever heard of, until Colonel Dudley asserted that there was or had been one. The report in my hand states, that no record of it had been preserved. The Massachusetts committee of 1750 say that they found none; and it is plain, from all the other reports that none existed at their dates. Even Dudley himself did not pretend that he had ever seen any. And there is not in the whole case, a particle of evidence that there ever was any such station in existence.

It is necessary that I should now take one more look at this now important Jack's Pasture, or Mill brook, and notice the use which the Massachusetts committee of 1791, endeavoured to make of it; and which the defendant endeavours to make of it, since it was then brought into notice. That committee, in its report, says: "It may not be unnecessary to observe, that at the northern head of what we call Charles river, is a place known by a large chestnut tree; thence the stream descends to Whiting's pond, where it forms a considerable

lake, and afterwards resuming its proper shape (and now known by the name of Mill river or brook,) pursues its course in a northerly direction till it joins that stream, which is known by the name of Charles river." Here the committee themselves mark the distinction between Charles river and the brook that runs into it, calling each by its own proper name, by which it had always been known and still is. If all the tributary streams which find their way into a river are to take its name, and to be considered part of it before they reach it and
*231 contribute their mites to its * waters, then would there be a mighty change in the great natural boundaries, by rivers, between nations and states, and even counties. If the Mississippi should be so measured, it would be a wonderful river to behold; and many a great state, and parts of states, would disappear from the map of the United States. But the Missouri is not the Mississippi, nor part of the Mississippi, until it joins it; and if a state should be bounded on a line to be run twenty miles distant from the Mississippi, nobody would dream of measuring the twenty miles from the Missouri as part of the Mississippi. When two rivers or streams come together and form one river, which keeps the name of one of the branches, that name can never be understood to comprehend the other branch, having a distinct name of its own. If, therefore, this Mill brook, instead of being a mere streamlet creeping into Charles river, was really a principal branch of Charles river, having its own proper name; neither that name nor the brook could ever be confounded with the river or its name, until they were swallowed up in the main river.

Here, your honours have the real and only question between the parties, upon the merits of the cause under the charters. That question (as first raised by Massachusetts committee of 1791, and never before) is, whether the first charter granted to Massachusetts, by King Charles I., in 1629, by the name "Charles river," meant Charles river proper, as it was then and ever since has been known and called; or, besides this, meant also Jack's Pasture, or Mill brook, running from near a large chestnut tree into a pond called Whiting's pond, two and a half miles off from Charles river, meant also the said Whiting's pond: and, moreover, another brook running out of the pond, and finally getting into Charles river. This, I repeat, is the only question upon the merits, as the defendant himself has made it. If the defendant is willing to have a trial upon the merits, let him put them in issue, or allow us to put them in issue. Both parties would then have an opportunity to produce their evidence applicable to that question. Among other evidence, we have in our possession certified copies of a large number of original grants, from 1659 to 1698, to individuals, of lands, bounded, some on Charles river, and some on Mill brook, or Jack's Pasture brook; all of them showing, that the river and brook were never confounded together, but were always distinguished by the same separate names they now are. We have also much other material evidence upon that question of the merits. But your honours cannot now hear any of it, because that question is not in issue, or on trial. The defendant virtually acknowledges the original title of Rhode Island, by setting up a supposed cession or grant from her, in bar of that title. Let him, then, present that bar matter and our reply to it, in such a manner that they can be fairly tried. Let him not deprive us of a fair trial upon one question or the other, either upon the merits, or the bar, or both; as he had it in his power to do under the twenty-third rule of practice established by the Court:
*232 allowing a defendant to have the benefit * of his bar matter, under his answer to the merits, as fully as he can by pleading it specially.

I will now proceed to consider the question of the sufficiency of the defendant's plea as a bar.

This plea is in bar to the whole bill.

The requisites of such a plea being familiar to the court, we have only to inquire whether the present plea possesses those requisites. Our objections to it, I will endeavour to bring under one or other of the following heads: 1. The matter of the plea does not constitute a bar to the relief prayed for. 2. The plea does not contain the statements of facts, and the averments necessary to a good plea in bar. 3. The plea is not accompanied by such an answer as the rules of equity require to support such a plea, and to give to the plaintiff the benefit of the material facts charged in the bill in avoidance of the plea.

The plea commences with relating that in the year 1642, a station was erected and fixed at a point then taken and believed to be on the true boundary line between the two states. So mere a story as this, would be thought too loose and light for the use of a common annalist, whose work is very unlike that of a special pleader. A station was taken, it is said; and we are left to conjecture that it was erected by one Woodward and one Saffrey, by its being called the Woodward and Saffrey station; who in another place are called skilful and approved artists. But the Massachusetts historian, Dr. Douglass, tells us, that they were two illiterate and obscure sailors, and would never have been heard of but for the controversies between Massachusetts and Connecticut and Rhode Island. There is no report or statement from Woodward and Saffrey themselves of their doings, and no record of any. The plea says that the station then set up was believed to be on the true line. This mode of expression would hardly have been used if any actual survey had been made, and the real charter line ascertained by actual measurement. The plea avoids stating that Woodward and Saffrey were employed by Massachusetts, or authorized by anybody. If they acted under the orders of the Massachusetts government—which I do not doubt, if they acted at all; which I do doubt, because I see no reason for believing it—then, what was done was the ex parte act of Massachusetts, and not binding upon anybody. It is not pretended that any notice was taken of Rhode Island in what was done. Indeed, it was only about six years before that date, that Roger Williams and his companions, having been exiled from Massachusetts for conscience' sake, took refuge in Providence. It is a matter of history, that neither Rhode Island, Connecticut, New Hampshire, Maine nor Plymouth, were acknowledged by Massachusetts, at that day, as possessing any power independent of herself. At that early period, she assumed to be mistress over all the surrounding territories; and she drew her lines and erected her stations as she pleased, without consulting her feeble neighbours, and in defiance of them.

And that she most wantonly encroached upon them all, is a matter
*233 * not only of history, but of judicial record. It seems to me that the defendant can add no strength to his plea in bar by basing it upon his own ex parte act, and insisting upon that act as the source and foundation of all the subsequent proceedings which he sets up as matters in bar to a claim founded upon his own charter as well as upon the charter of a sister state.

The plea proceeds to state, that, by virtue of an act of the General Assembly of Rhode Island, passed the 30th of July, 1709, Major Joseph Jenckes was appointed to meet Colonel Dudley, who was appointed by Massachusetts, and to settle the misunderstanding about the line, &c.: "provided it be within six months after passing of the act of the said Assembly;" that "said Jenckes and Dudley, on the 19th day of January, then next ensuing, and within six months from the passing of said act," did meet and conclude the following agreement, &c. Here is an error in the reckoning of time apparent on the paper. The recited agreement is dated, "Roxbury, January 19th, 1710-11," which was eighteen months instead of six months after the passing of the act referred to. The mistake of defendant probably arose from not noticing the double dating prac-

tised at that day, and including both the old and the new style. By the old style the year commenced and ended on the 25th of March. So that the same month of January, which was part of the year 1710, by the old style, was the commencement of the year 1711, by the new. But, take it either way, the month of July 1709, was eighteen months prior to the date of the instrument. This being the case, the agreement of Jenckes and Dudley was null and void: Jenckes' authority to act having expired a year before he did act.

The case would have been altered, had the two governments afterwards confirmed the instrument. But no such thing was done by either government, and is not alleged to have been. This instrument, therefore, is no bar to the bill.

But, as every subsequent proceeding set up in the plea is therein averred to have been based upon this Roxbury agreement, and taken in pursuance of it; and as it is from and under and by virtue of this agreement, that defendant claims to have held possession; I will, with permission, make some remarks upon it, for the purpose of showing its character, and the manner in which it was obtained.

It is stated, that the committee met at Roxbury, and then and there debated the challenges concerning the several charters, &c. relating to the line between the two colonies. This reference to the charters makes them part of the instrument as much as if they had been annexed to it. Now, by the Massachusetts charter, her southern boundary line was to be three English miles south of the most southerly part of Charles river. Thus, the plain duty of the committee was to go to Charles river, ascertain the most southerly part of it, measure off the three miles south, and thence run the line east and west, or erect a monument from which the line might be run. But the committee performed no part of this duty, and took no single step by which the object of their appoint-
*234 ment could be effected. * They took no view of Charles river, made no survey or measurement, nor any attempt to ascertain the charter line. On the contrary, Jenckes went to Roxbury, two miles out of Boston, and thirty or forty miles from the place where his business called him; and there, at the door of Governor Dudley, they debated the challenges, as they call it. This is easily accounted for, and can be accounted for in one way only. The two committees and their respective colonies were very differently situated. It was plainly for the interest of Rhode Island, to have the true charter line ascertained and established, and not to be tied down to the ex parte doings of Massachusetts. But Massachusetts had already carved for herself, and was desirous only of keeping what she had taken; and it was, therefore, the purpose of Dudley, her commissioner and governor, to draw Jenckes away from Charles river, and to avoid having any inspection or actual survey taken, by which, at the same time that the true charter line was ascertained, it would be made to appear that Massachusetts had encroached largely upon Rhode Island. And Dudley gained his point, and brought Jenckes to join with him in saying and agreeing that "the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful and approved artists, in 1642, and since often renewed, &c., being three English miles distant from Charles river, agreeably to the letters patent for the Massachusetts province, &c., should be the commencement of the line, &c." Can it be doubted, who dictated this instrument, and who drew it. These representations of the doings of Massachusetts agents were palpably made by Dudley, the then Massachusetts agent, to Jenckes. Jenckes did not know that there ever were such men as Nathaniel Woodward or Solomon Saffrey; or that they were skilful and approved artists; or that they ever set up any stake anywhere: or that it had

been often or ever renewed. He did not even know that any such stake then existed, much less that it was three English miles, and no more, from Charles river. Yet, all this Dudley induced him to subscribe to. If it was allowable here, we could show that the very same language used in this report about Woodward and Saffrey, and their skill, and their station, &c. &c. was Dudley's language, used in a communication from him made four years before. And the very truth is, that Jenckes's appointment was procured by Dudley himself, as appears by the vote itself, passed by the General Assembly in July, and referred to at the commencement of this plea, as giving Jenckes authority to act. Which vote recites, that, "whereas, the Assembly has been credibly informed that his excellency Colonel Dudley has declared, that if Major Joseph Jenckes was empowered thereto, he doubted not but that they two should settle," &c. &c. The General Assembly did not foresee the use that Colonel Dudley was to make of his Major Jenckes.

I do not forget that we are now trying the sufficiency, and not the truth of defendant's plea. But the averments in the plea cannot cover or protect such marks or evidences of mistake, misconduct, undue influence, &c. &c. as ap-
*235 pear upon the face of the instrument * itself, pleaded in bar; for these go to show the invalidity of the bar. There are other such marks on this instrument. The line, it says, is to be run "as is deciphered in a plan or tract by Nathaniel Woodward and Solomon Saffrey, now shown to us, and is now remaining on record in the Massachusetts government." It is a trifling circumstance to remark upon; but it is now acknowledged, that the plan or tract spoken of was never on record in Massachusetts, otherwise than as it was deposited in the secretary's office; and, if Dudley then had it at Roxbury, it was not then remaining on record. But what had Jenckes to do with this ex parte plan, any more than with the ex parte station of Woodward and Saffrey; of neither of which had he any knowledge beyond the mere assertion of the adverse party. And let me ask, why was not that plan or tract, or a copy of it, annexed to the instrument of which it was made a part, and which, without it, was a nullity, and could not be carried into effect, any more than a bill of sale of certain articles enumerated in an inventory not annexed or identified? And where is that pretended plan now, that it is not produced here? The counsel says, that it is on record, or on file; and will be produced on proper occasion. And is not this the proper occasion, when the validity of the instrument, of which the plan is made part, is on trial; and that instrument cannot be understood without the plan it refers to and rests upon? The counsel have procured and produced a recent plat to show the importance of Mill brooke. Can it be believed that the pretended Woodward and Saffrey plan would not be produced, if any thing favourable was to be found in it? I have no doubt that there was, at some time or other, and now is, a scrawl of some kind, which has been called the Woodward and Saffrey plan or tract. But I am confident, that, whenever it makes its appearance, it will be seen that the person or persons who made it, whether Woodward and Saffrey, or somebody else, long afterwards, were grossly ignorant; and no glimpse of light can be obtained from it to aid in ascertaining the line between the parties.

Lastly, the committee agree that persons should be appointed by the governor and counsel of each state, to show the ancient line, &c. Here we see Governor Dudley again. Massachusetts had, and still has, a distinct political body so entitled, and with the power of appointment; but there was no such body in Rhode Island. Jenckes knew this, and yet he repeated after Dudley whatever was dictated to him. But no such committee was ever appointed by either government; and is not alleged to have been.

Next, the plea recites parts of votes passed by the two legislatures, in 1717 and 1718, appointing another committee to settle the line, and then sets out the agreement made by those committees at Rehoboth, October 22d, 1718. And the plea avers that those committees were appointed, and the agreement made "in pursuance of" the Roxbury agreement of 1710, 1711, which I have just been examining.

It appears that both legislatures, by their first votes, did restrict
*236 * their respective committees to the Roxbury agreement. But the Rhode Island legislature, by its subsequent vote, passed June 17th, 1718, expressly disowned the Roxbury doings, and gave its committee unrestricted power to settle the line, as near as might be, according to the charter; and the Massachusetts legislature, by its second vote, gave the same power to her committee. And thus the Roxbury agreement, which was void in itself from the beginning, was abandoned by both parties.

The Rehoboth agreement, (as it is called, from the place where it was made,) is in eight and a half lines, with a preamble: and the whole of it is, that the line should be run from the Woodward and Saffrey stake, so as to be at Connecticut river two and a half miles south of a due west line. This agreement is liable to some of the same material objections that have been made to the Roxbury agreement. The committee paid no regard to the charters, nor made any attempt to ascertain the true charter line. They arbitrarily adopted the pretended Woodward and Saffrey stake, wherever it might be; without knowing that there was any such stake, or going to see either that or Charles river. The plea then alleges, that the General Assembly of Rhode Island accepted this Rehoboth agreement, and ordered it to be recorded; and thereby ratified and confirmed it. I will consider, presently, what kind of ratification this was.

The plea now introduces the last instrument upon which it relies, and which has been called the report of the running committee. That committee consisted of four persons, who say, in their report, that they were appointed by the Rehoboth committee to run the line by them agreed upon. This is the only evidence there is of their appointment by anybody. The Rehoboth report speaks of no such committee; and none such was appointed by either colony. Whatever their authority was, they undertook to run a line, and say in their report of it, that "having met at the stake of Nathaniel Woodward and Solomon Saffrey," &c. &c. This was speaking loosely. The stake set up by Woodward and Saffrey, in 1642, (if ever set up,) certainly was not in existence in 1719. Their meaning probably was, that the stake they met at was where the Woodward and Saffrey stake had been. But how did they know this; and what authority had they for saying it? No doubt there was a stake where they met, for they would not have been carried there, without a stake for them to start from. But who set up that stake, and where was it set up? Neither the Roxbury committee of 1710, 1711, nor the Rehoboth committee of 1718, set up any stake or monument. They only speak of a stake said to have been set up by Nathaniel Woodward and Solomon Saffrey, in 1642, and since often renewed, in latitude 41° 55′, (says the first committee,) but they saw no such stake, nor knew that any such existed. Thus, this running committee had nothing to go by. They had not the plan or tract of Woodward and Saffrey, nor did they take the latitude 41° 55′, on which the Roxbury report said the Woodward and Saffrey stake was set up;
*237 for that latitude would, in fact, have carried * them many miles off from the stake where they met; which, as appears from the line described by the committee) was in latitude 42° 3′. By their own showing, the running committee had no power to fix any station, or set up any stake themselves. How,

then, did they know that the stake they saw was where the Woodward and Saffrey stake had been? They could only believe from what was told them; and that, in all probability, by persons interested, and who had themselves set up the stake they wished the line to be run from. It was the tradition in that quarter for many years, and derived from the old men of the day, that the pretended stake was a bean pole, stuck up by John Chandler, one of the running committee. At all events, that committee had no right to hear evidence, for they had no power to decide.

Thus, from all that appears, there is as good cause for believing that the stake from which these four men started, was any where else, as that it was at or near the place of the Woodward and Saffrey stake, if there ever was any.

For myself, I can see nothing in all those proceedings, from beginning to end, but imposition, and the exercise of undue influence over the Rhode Island committees.

The plea then alleges, that the said report or return of the running committee "was approved by the General Assembly of the said colony of Rhode Island," &c. This is copied from our original bill; but in the amended bill (page 36,) those words are stricken out, being incorrect, and the words, "the above return is accepted by the Assembly; a true copy, extracted from the public records of the colony of Rhode Island, examined by T. Ward, secretary," inserted. That being the minute appearing on the document itself. I have no desire to be critical, but it may be observed, that there is no vote of acceptance. A secretary or clerk can only certify to a copy of a vote. He has no authority to certify that such or such a thing was done, or vote passed. The record is the only evidence of votes; and certified copies are the evidences of the record.

But what does it amount to, if there were such a vote? It was no more than the ordinary form on such occasions. When a legislative committee makes a report, something is to be done with it; and the usual course is to receive or accept it; and then it is laid on the table, or ordered on file, or taken up and acted upon. The same course was pursued in the legislature of Massachusetts, as appears by the secretary's minutes, on some of the reports of their committees. But the report so received or accepted is nothing of itself, until some legislative act is passed upon the subject of it.

But the legislature of Rhode Island never passed any act confirming the doings of either of those committees, or establishing either of the lines (for they all differ) spoken of by them. Nor did the legislature of Massachusetts ever pass any such act; and it is not alleged that she did. And, if one of the governments had confirmed those proceedings, by ever so solemn an act
*238 of ratification, * the other could take no advantage of it without passing a similar and mutual act of confirmation on her part.

But as there was no such ratification by either government, it seems that the defendant would now set up the doings of the committees, as binding and absolute in themselves, without any legislative acts confirming them: thus making the committees independent of, and paramount to, the legislatures which created them. This is novel, and I should think, dangerous doctrine. If this is true, the moment the legislature passed a vote appointing a committee to perform a certain service, it parted with all power over the subject; and could neither revoke the appointment, nor vary, nor in any way touch the powers of that committee. This was not the understanding of either legislature at the time of passing the votes and appointing their committees, as has already been shown. The boundary line between Massachusetts and Connecticut (which by their charters was precisely the same as ours) was agreed upon by a joint committee, in 1713; and the doings of that committee were ratified and confirmed

by mutual acts passed by both legislatures: and it was those legislative acts of confirmation, and not the report of the committee, upon which Massachusetts wholly relied in their subsequent dispute respecting the line. And even those solemn acts of ratification were set aside for the same causes and grounds which we are now presenting to the Court. This, as I before remarked, is new ground, even for Massachusetts to take. For her own committee of 1791, (whose report, jointly with the Rhode Island committee, is copied into our bill; and whose separate report to their own legislature is annexed to the bill, and has already been referred to,) that committee, remarking that the proceedings of the former committees had not been confirmed by either government, joined with the Rhode Island committee in recommending to their respective governments, "to submit the matter in dispute to indifferent men of the neighbouring states; or to unite in an application to Congress to settle the same, agreeably to the respective charters, and the Constitution of the United States."

I have thus far endeavoured to show from the plea itself that the matter contained in it does not constitute a bar to the plaintiff's bill; and will now, with permission, proceed to the two other general grounds of objection, which, as they are closely connected, I will consider together. They are, 1st, That the plea does not contain the statements of facts, nor the averments necessary to a good plea in bar; and 2d, That it is not accompanied by such an answer as the rules of equity require to support such a plea, and to give the plaintiff the benefit of the matter charged in the bill in avoidance of the plea. I wish it to be understood that we make no objections to the mere form either of the plea or answer. Our objections are to the merits, and substance of them. And we contend, that not a single material fact charged in the bill, in avoidance of the bar
*239 matter pleaded, is negatived or met by any averment in the plea, or by * the answer. So that, as the plea and answer now stand, the defendant would avail himself of his legal defence, while he would exclude the plaintiff from all the equitable facts and circumstances charged in the bill in avoidance of the bar; which, by the rules of equity, a defendant is not permitted to do.

In avoidance of the two agreements plead in bar, viz. that made at Roxbury at 1710, 1711, and that at Rehoboth in 1718, the bill charges that the Rhode Island committees who signed those instruments were misled by representations made to them by the Massachusetts committees, and acted under the mistaken belief that the pretended Woodward and Saffrey station was really on the true charter line, and was no more than three English miles from the most southerly part of Charles river; and that under this erroneous belief they signed the agreements; which, if confirmed, would transfer to Massachusetts a large portion of territory justly belonging to Rhode Island, and the jurisdiction over it. This is the general charge; and in support and proof of it, the bill charges the following facts, viz., that by actual survey and measurement, it is proved that the line alleged to have been run according to those agreements is near eight miles, instead of three miles, distant from the most southerly part of Charles river, and takes from Rhode Island a tract of territory four miles and fifty-six rods wide on the east, and over five miles on the west end; and in length, twenty-three miles: that said line does not conform to the line designated in either of said agreements, it being in latitude 42° 3′ N., whereas, the supposed Woodward and Saffrey station is alleged to have been in latitude 41° 55′: that neither of said committees made any survey or measurement, nor any attempt to ascertain the true charter line; that, at the dates of said agreements, there was no such station as the pretended Woodward and Saffrey station, nor any evidence that there ever had been any: that said committees saw no such station, and

took no step to ascertain whether there then was or ever had been any, or how far it was from Charles river, if it did exist.

It was the duty of the plea to have met and negatived the main charge by direct and positive averments; but there is no such averment to be found in the plea. The principal averment is, that there was no covin, fraud, or misrepresentation. The bill does not charge covin or fraud, although it might justly have done so. The averment of no misrepresentation, is evasive, and no direct negative; for the defendant might admit that such representations were made as the bill charges, and yet might consistently aver that no misrepresentations were made, for he might say they were true. But it is of little importance from what source the committees received their impressions; it is enough that the bill charges that they acted under an erroneous belief; and this charge is not touched by any of the averments. The other averments are, that the whole merits of the plaintiff's claim were heard and decided upon by the committees: that the agreements were fair, legal, and binding, and made with a full
*240 and equal knowledge of all circumstances by both parties. All * the first part of this is mere opinion and assertion. A man charged with a breach of contract, might as well reply that he was an honest man, and a man of fair standing. The sweeping allegation that the agreements were made with a full and equal knowledge of all circumstances, has none of the qualities of an averment required in pleading. It is no traverse of any specific charge or fact. No fact charged, however important, could be put in issue under it. Yet that is the whole object of averments in the plea; which are therefore required to be direct and positive, not evasive, or by way of opinion, inference, or implication, which it is the province of the Court to deal with, not the party.

The bill also charges that the legislature of Rhode Island was deceived, and led to believe that its committees had ascertained the true charter line: that there really was such a station as the Woodward and Saffrey station, and that it was on the true line, and no more than three miles from Charles river. This charge is most important, because the legislature, if it had not itself been deceived, could have corrected the errors of its committees. Now there is not a word in the plea or answer that in any way meets, much less negatives, this main charge; which goes to the roots of the pretended agreements. And the defendant might as well have put no averments at all into his plea, and accompanied it with no answer; and still have insisted upon having the pretended agreements sanctioned and allowed to be valid, without any examination whatever. Will equity countenance any such practice? It is observable that the Roxbury agreement is so framed, and contains such statements, as could not fail to mislead and deceive the General Assembly of Rhode Island. The committee professed to go by the charters and letters patent of the two colonies, as the legislature of Rhode Island expected they would, and supposed they had done. The committee then adopt the supposed Woodward and Saffrey stake, "being (they say) three English miles distant from the southernmost part of Charles river, agreeably to the letters patent for the Massachusetts province." It cannot be averred here that Governor Dudley had no hand in making this representation. And how was it possible for the legislature of Rhode Island to avoid being deceived by this representation?

So much for the averments in the plea. And now for the accompanying answer—if that can be called an answer, which is a mere repetition of the averments in the plea, without the slightest addition to them. Can such an answer be said to support the plea, as the rule in equity requires that it should? But to support the plea is not the only office of the answer. It must meet and re-

spond, particularly and specifically, to every fact and equitable circumstance charged in the bill, in proof of the main charge in avoidance of the bar matter pleaded; to the end that the plaintiff may have the benefit, and avail himself of his equitable defence against the bar. If the answer cannot do this with truth or safety, then the plea is not only a defective and insufficient one, but is
*241 an improper plea to be * used. May I not correctly say that this plea is not supported by such an answer as the rules of equity require; and without which the plea cannot be sustained?

Again, the bill charges, that the agreements now set up were never consented to by the king of England; without which, at that day, the colonies had no power to make any compact affecting their territories or jurisdiction. This being the case; it was necessary for the plea to show the authority of the two colonies to act, as it was to show the authority by which their committees acted. This same objection was made by the state of Connecticut, in her controversy with Massachusetts about their boundary line; and made too against the validity of the solemn acts of the two legislatures. And how was it met by Massachusetts? Her reply was, that her government, by its charter, was required to send all its public acts to the king, for his approbation; and that such of them as were not disallowed within a certain period were to be considered as allowed. It was, therefore, inferred by Massachusetts, that this course must have been taken upon the occasion of her compact with Connecticut; and that that compact had been tacitly consented to by the king. In the case of Poole *vs.* Fleeger, recently decided in this Court, there was a formal compact between the states of Kentucky and Tennessee, settling a boundary line between them; which compact was formally ratified by both governments, and consented to by Congress. The Court said in that case: "It is part of the general right of sovereignty belonging to independent nations to establish and fix disputed boundaries. This right is recognised by the Constitution of the United States, with the limitation or restriction requiring the consent of Congress." As, therefore, the consent of Congress is necessary to the validity of such a compact, even at the present day, it follows, that a party who pleads such a compact in bar to a suit, must show its validity, by stating the consent of Congress to it. But in the present case, the bill itself charges the defect in the Roxbury and Rehoboth agreements; and the charge ought to have been directly met and responded to by the plea and answer. It is for the purpose of showing the insufficiency of the plea, in this respect, that I mention the charge contained in the bill; and not for the purpose of discussing here the objection itself to the two agreements, which would not now be proper. But the plaintiff has a right to be heard upon that question, at a proper time, and therefore, the defendant was bound to respond to the charge.

The plea concludes by stating, in substance, that the defendant doth plead the said agreement of 1710, 1711, and the said agreement of 1718. "And unmolested possession according to the same, from the date of the said agreements, in bar to the whole bill," &c. The opening counsel for the defendant has considered the alleged possession as constituting a distinct bar of itself. If this is the meaning of the plea, it is pleading double; which is a fatal objection to any such plea.

The passages, therefore, read by the counsel from Vattel, to show that
*242 prescription may give a good title, are * out of place; supposing that the counsel did not mean to spoil his own plea. To be sure he ought to understand his own plea best; but I suppose that long possession under the two agreements, is alleged in the plea, for the purpose of aiding and protecting them from inquiry into defects in their origin. Long possession is frequently used for this purpose. But this plea alleges long possession only. It alleges no ac-

quiescence in or assent to that possession, without which mere naked possession is of no avail; for it furnishes no inference of the fairness of the original transaction sought to be sustained. This may be illustrated by a very common case. A man obtains a conveyance of an estate, by imposition or some unjustifiable means, which, in equity, vitiates and annuls the transaction. And, having got possession, he retains it for many years. But, in the mean time, the injured party, having discovered the imposition or mistake, and the injury done him, demands restitution from the wrongdoer, who holds many conferences with him; but evades the claim and avoids any inquiry into the justice of it, continues to hold possession. It is plain, that in such a case, the continued possession of the wrongdoer, instead of bettering the original transaction, aggravates its injustice. It is laid down by Vattel, page 192, that even prescription or usucaption, cannot be set up against a party who is not in a condition to enforce his rights. This is precisely the plaintiff's case. And this case is clearly and fully made out by our bill. And if the defendant had given us a sufficient plea and answer, so that we might have taken issue, the question of her alleged possession might have been tried, and we should have had an opportunity to rebut and avoid the alleged possession, by producing the facts stated in the bill, and other evidence, proving that the defendant has had no such possession as can give any aid or countenance to the two agreements which she relies upon, and which we impeach. But no such trial upon the question of possession can be had under the present question as to the sufficiency of the plea; and I can only refer to the facts charged in the bill, for the purpose of showing the insufficiency of the plea in not having met and responded to those facts, so that they might have been put in issue and tried. The bill, after pointing out the imposition or erroneous belief under which the Roxbury and Rehoboth agreements had been signed by the committees; states that the error or mistake thus committed, and the wrong thereby done to Rhode Island, were not discovered until an actual survey of the premises was made in 1749, 1750, by which the true charter line was ascertained. That from that time Rhode Island never ceased to assert her claim, or to deny the right of Massachusetts to the possession of the territory of which she had wrongfully gotten possession. That the Rhode Island legislature had, time after time, appointed, and continued, committees, for the purpose of effecting a settlement of the dispute with Massachusetts, and had constantly urged that colony, and afterwards state, to appoint committees on her part for the same pur-
*243 pose; which had been done by Massachusetts, and many conferences * upon the subject of the existing misunderstanding had been held by those committees from the year 1750, and continued to be held up to a recent date. But without producing any good effect: except in the year 1791, when the committees from the two states, not being able to agree upon the main subject, did agree to recommend to their respective governments to refer the matter in dispute to indifferent men of other states, or to Congress, to settle the same agreeably to the respective charters; the Massachusetts committee being satisfied that nothing binding on either party had as yet been done. That some time after the committees appointed by the two colonies in 1749, 1750, had failed to effect a settlement, Rhode Island prepared to prosecute her claim before the king in council. "But that, being then thinly populated, and her resources very limited, and the war with France having soon after broken out, by which her attention was directed to other objects, and her resources exhausted; her endeavours to obtain a settlement of the line, according to her charter, were ineffectual; and that her efforts to effect that object were again suspended by the war of the revolution. But that, towards the end of that war, in 1782, upon the petition

of a large number of the inhabitants residing on the disputed territory, claiming of right to belong to Rhode Island; the legislature again appointed a committee who reported in favour of said claim."

Besides these, there are other material facts and circumstances to the same effect, which, whenever the question of the alleged possession by Massachusetts shall be tried, will conclusively prove, that from the year 1748, 1749, when the error in the boundary line was first discovered, Rhode Island has never, for a moment, acquiesced in the justice of that possession, but has constantly denied it, and demanded restitution; and that the character of that possession has not been such as to give any consistency or validity to the pretended agreements of 1710, 1711, and 1718, or either of them. But, as that question of possession is not now on trial; I presume that the references I have made to the charges in the bill, upon this head, are enough to support our objection to the plea and answer for insufficiency, in not having in any way negatived, met or responded to a single one of those charges. I may, however, be allowed to remark, that, undoubtedly, Rhode Island was always very reluctant to engage in a conflict with her powerful neighbour. And it is apparent, that the part which Massachusetts herself acted, from the time that the error was discovered in 1749, was the chief cause that Rhode Island did not sooner adopt stronger measures for enforcing her right. For, the committees which Massachusetts continued to appoint and keep up, although they parried the claim of Rhode Island, yet, by temporizing with her committees, and leading them along from period to period, encouraged the expectation that an equitable settlement might finally be effected. And certainly, Rhode Island had a right to indulge in this expectation, particu-
*244 larly after the year 1791, when the Massachusetts committee * itself recommended the appointment of impartial referees to settle the line according to the charters; which they were satisfied had not been done, but ought to be done.

It ought to be recollected also, that, during all that period, the same controversy existed, and was carried on between Massachusetts and Connecticut. The two complainant states co-operated together, particularly in the measures taken to bring their complaints before the king in council. Connecticut was the larger and more influential colony; and Rhode Island very properly expected her to take the lead in the common cause, relying upon her efforts to bring Massachusetts to justice. But during all that period there was never any acquiescence by Rhode Island, any more than by Connecticut, in the wrongful possession of Massachusetts; both colonies, or states, equally and constantly protested against that wrongful possession, and demanded restitution. It was not until the year 1804, that Connecticut brought Massachusetts to terms: and certainly, when that was done, Rhode Island had good reason to hope that her claims (resting upon her same basis as those of Connecticut) would also be listened to, and her rights respected by Massachusetts. And accordingly, committees were soon afterwards appointed by the two states to make a settlement between them. And those committees continued their conferences, until no long time before the commencement of this suit. Clearly, Massachusetts had as good a pretence for setting up her long possession against Connecticut, as she can now have for setting it up against Rhode Island: and better; for the agreement made in 1713, by their committees, adopting the same pretended Woodward and Saffrey station, as did the Roxbury committees in our case; that agreement was confirmed and ratified by solemn acts of both governments. But Connecticut would not consent, that a possession, wrongful in its commencement and continuance, and always protested against, should be used to support an agreement obtained by

unfair means, and under which that possession had been unjustly held. And Massachusetts acquiesced in the objection, and abandoned the pretence of possession. Can she now revive the same pretence against the other copartner state; with whom she had, at the same time, precisely the same controversy.

The counsel had dwelt and laboured upon this allegation of possession, as if the mere fact of possession was the only thing he had to establish. And has read a part of our bill to show that that fact is admitted by the plaintiff; and this, he thinks, settles the whole matter; keeping out of sight the facts charged by way of replication, in the bill (in conformity to the practice in equity,) in avoidance of the admitted possession, showing that the alleged possession was unfairly obtained, had been unjustly continued, and always protested against. This is the incurable defect of the plea itself. It tenders no issue upon the only facts upon which an issue can be taken. The fact of possession being admitted by the replication, makes no part of the issue to be joined. The facts
*245 charged in avoidance * of that possession, are the only facts to be put in issue, so far as possession makes part of the bar matter pleaded. As well might a defendant who pleads a release in bar, to which the plaintiff replies, admitting the execution of the release, but charging that it had been obtained by fraud; as well might the defendant refuse to have any trial upon the charge of fraud, and still insist upon his naked release, because the execution of it is admitted.

It has been asserted, that Rhode Island was never, for a single moment, in possession of the territory in question. This is saying too much. When the Rhode Islanders were driven from Massachusetts because they were Baptists and Quakers, they purchased of the native proprietors, and honestly paid for that part of the Narragansets' country which was beyond the jurisdiction of the hostile colony; and there they colonized and took possession of the country in 1635, 1636. In 1643, they obtained their first charter, and their last in 1663; confirming their purchase from the native proprietors, and erecting them into a colony, bounded north on the charter line of Massachusetts colony. If certain persons (whatever their names) did go into the wilderness in 1642, and did, somewhere or other, set up a stake, and leave it standing, that act did not interfere with the rights of anybody. If the Massachusetts colony had any agency in that (which no how appears, nor is alleged in the plea,) she certainly did not pretend to take any possession adversely to the king or the king's grant to Rhode Island. Rhode Island, therefore, was clearly in possession, at least down to 1710, 1711, the date of the agreement between Dudley and Jenckes; as to the possession which Massachusetts then obtained, how she obtained and how retained it, I have already sufficiently commented upon; more than sufficiently, for the purposes of this argument upon the sufficiency of the defendant's plea.

Sundry passages have been read from Vattel, to show the sacred character of treaties and compacts between sovereigns. Who ever doubted so self-evident a proposition? But what are those treaties and compacts which are so obligatory? They are such as are just and unimpeachable; executed fairly and freely; without suggestio falsi, or suppressio veri; free from the charge of imposition, or undue practice, or unjust advantage. Is there any thing to be found in Vattel, that enjoins the observance of a compact of a different character from this; much more the confirmation of such a compact when made by agents acting under a gross mistake of facts? I am unable to comprehend the doctrine which would apply different rules and principles of justice to the conduct of sovereigns, and to that of individuals, Justice herself knows no such distinction.

The counsel has intimated, that the habits and feelings of the inhabitants

of that district, would revolt at being included within the limits of Rhode Island. He speaks without authority, and is wholly mistaken. Some years ago a large and respectable portion of those inhabitants, in a memorial to the legis-
*246 lature of Rhode * Island, claimed to belong to that state; and solicited the legislature to enforce their right. I am fully warranted in saying, that the mass of those inhabitants still entertain the same opinions and wishes.

Mr. Webster, for the State of Massachusetts.

The colonial grant of James the First of England, of the Plymouth colony, was on the 3d of November, 1621. The grant was for all the lands lying between the fortieth and forty-eighth degrees of north latitude, extending westwardly from the ocean. On the 19th of March, 1628, the council of Plymouth made a grant to the Massachusetts settlers, of the territory destined to form the colony of Massachusetts. This grant was of all the lands lying between the Merrimac river on the north, and three miles south of Charles river, from the Atlantic or Western Ocean, on the east part, to the South Sea, on the west part. This grant was confirmed by Charles the First.

The description of the territory is first found in the grant of the council of Plymouth to Massachusetts. Charles river was so called after 1625, and before 1628. At that time, there was not a white man in Massachusetts. It is a very important fact, and lies at the foundation of the question, in this case, that at the period referred to, the boundary three miles south of Charles river, was fixed when that river had never been ascended by the colonists three miles from its mouth. The first settlement made by the colonists was in Salem. It was made by Governor Endicott. Boston was not settled until 1630; and until that year Charles river was never ascended.

The facts stated in the plea, and which are admitted by the complainants, are, that in 1642, Woodward and Saffrey's monument was set up, to establish a south line for Massachusetts. This is clearly and distinctly stated in the early part of the plea.

This brings us to the fact, that fifteen years after the settlement of Massachusetts, the monument was established, and was known, and notorious. This was the position established for the boundary line of the colony; and it is important to ask, if, by this line, Massachusetts encroached on territory, not a part of her territory, on whose territory did she encroach? Not on that of Rhode Island; for the colony of Rhode Island did not then exist. She must have encroached on the territory of the crown of England. This state of things remained until 1663, when the colony of Rhode Island was established. Charles the Second did not grant the territory which composed the colony of Rhode Island by metes and bonds; other than declaring the north line of the colony to be "on the north, or northerly by the south or southerly line of Massachusetts plantations."

The colonies established by those grants did not hold under the king of England. The language of the grants, in express terms, excluded this. They were grants in "free and common socage." When Rhode Island received her territory by the grant, she received it bounded by the southwardly line
*247 of Massachusetts. This was an * acknowledgment of the boundary.

Now, after the elapse of one hundred and ninety-eight years of full and uninterrupted possession by Massachusetts; as a colony until 1776, and as a state up to the present period; she seeks to drive Massachusetts back from this line; and to take from her sovereignty and dominion over three miles of territory.

Why is this effort made? Why is this disturbance of the quiet and unmolested possession by citizens of Massachusetts, claimed? Not because Rhode

Island has a boundary different from that by which she has hitherto been restrained. She had no rights, when the colony was established, other than to the line now existing between the two states. All she has of boundary or of territory, are, by the express terms of her grant, secondary to those of Massachusetts. She goes up to the southerly line of Massachusetts; and there she must stop, now, as heretofore.

The case presented to the Court, on the bill and answer, is that of a second grantee, taking his boundary from a prior grant; and who, after the elapse of one hundred and ninety-eight years, seeks to disburb the line so long existing and recognised between the prior grantee and himself.

On what ground, is this attempt made? It is said, the boundary was fixed by mistake. But the state of Massachusetts does not acknowledge any mistake; unless it is found in the fact, that her true southern boundary, if it had been correctly run, would be yet more south than that fixed by the Woodward and Saffrey station. Going higher up Charles river, a point far south of that station could have been found; which would have fully answered the boundary described in the colonial grant, of a line three miles south of Charles river.

How is it sought to maintain the position that the Woodward and Saffrey station is more than three miles south of Charles river? It is said that "Mill brook" and "Whiting's pond" are not parts of Charles river.

It is important to bear in mind, as has been stated, that when the station was fixed, but little of Charles river was known. The object of the grant was to give to the colonists the benefit of all the waters of Charles river; and the station was fixed in this view of the subject. "Mill brook" and "Whiting's pond" formed branches of the river, as was then understood, and has ever since been so considered. The question now before the Court is identical with that which now disturbs the harmony of the United States and England; as to the northern boundary of the state of Maine.

The question before the Court is brought under the provisions of the Constitution of the United States. By what code of laws is it to be decided?

There were no provisions in the articles of confederation, nor are there any in the Constitution of the United States, prescribing the modes or rules of proceeding in such a case; nor are there any laws of the land, or rules of
*248 Court, to regulate such a procedure, except * as to the notice of the institution of the suit. In the history of the world, there is no account of a similar proceeding in any Court of judicature. No adjudication of such a controversy is known in any Court of the world. If any determination of the case is to be made, it must be under the law of nations.

Will this Court consider the case as one between individuals; a question of contract; and to be considered by the Court with a view to enforce the contract, as if it were between two citizens or two individuals, parties to the controversy? No state in the Union would submit to such a view of the case. Its rights, as a sovereign state, are deeply involved in this question. The rights of the citizens to the government under which they were born; to the laws which they have assisted to make; and under which they have always lived, and desire still to live; under which they have acquired and hold their property; are to be submitted to the Court.

The bill filed by the state of Rhode Island calls on the Court to change the allegiance of a large number of the citizens of Massachusetts; to oblige them to submit to a different body of laws than those which, by their own choice, have heretofore governed them: to dismember a state: and this on the ground that, nearly two hundred years ago, a mistake was made in fixing the boundary line

between the two contending sovereignties. A possession of one hundred and ninety-eight years is thus to be disregarded; and all the rights of citizenship, all the rights of property, all the affections of the people to the state of their birth, education, and prosperity, are to be set aside.

No complaint is made that the controversy between the parties to this case is presented by a bill in equity. It was proper to do so; but this does not change the rules by which the case is to be decided. A Court of Equity restores the consideration which has been paid by a party to a contract, when it rescinds the contract. Will this Court break up the compromise which was made by Massachusetts with Rhode Island; and return to Massachusetts the one mile of her territory which was given by her to Rhode Island when the compromise was made?

This case must be discussed and settled upon principles which will have the sanction of the whole civilized community. What can be more extraordinary and unusual, than an attempt, after the elapse of one hundred and ninety-eight years, to open a question on the ground of a mistake by the parties who had at that long by-gone day adjusted the controversy, in which adjustment, the mistake is alleged to have been made. Louis the Fourteenth broke a treaty solemnly made, on the ground of a mistake in the negotiators of the treaty; and all Europe was involved in war. The remarks of Voltaire on this act of the King of France, will apply to the attempt made in the case before this Court by the state of Rhode Island.

The state of Massachusetts has a right to call upon the complainants for a case, in which a natural and ascertained boundary, known and acted
*249 upon for so long a period, has been disturbed. Look at * the question presented for the consideration of the Court by the agreements between the commissioners of the two colonies, while they were colonies; and which had the acquiescence of the legislatures of both the parties. These are all stated in the plea. It is alleged by Massachusetts that there is a boundary between her and Rhode Island, of one hundred and ninety-eight years' standing; that this boundary was established by competent persons in 1710, and again in 1717; and from 1710, to the present time, Massachusetts, as a colony and as a sovereign state, has held the territory now claimed from her. Can a better reason against the removal or change of a boundary be given by any state?

Is not this a good diplomatic answer to the claim of the state of Rhode Island? One sovereign and independent state asks territory from another state, of equal rank with herself. She is met by the fact that the territory asked has been in possession of the state from which she asks its surrender, for nearly two hundred years. This should settle the question between the states. Established boundaries for one hundred years would not be disturbed between nations, with the consent of other nations.

What was the mistake asserted to have been made by the commissioners of Rhode Island? It is said they were misinformed as to the distance of Woodward and Saffrey's station from Charles river. It is admitted by the complainant, that the commissioners of Massachusetts acted in good faith: and yet the agreement is to be cancelled.

Fraud, actual fraud, would not set aside an agreement, after so much time had elapsed. If a party has slept on his case, or has suffered others to act under the belief that the subject was fully and finally arranged, Courts of Equity would not interfere after nearly two centuries had gone by; and property had been acquired, civil rights asserted, and undisturbed, during the whole of that long period. Although no attempt is made to change or affect the tenures of property,

the civil rights of thousands are to be changed, and transferred to another government to which they are strangers.

Again an authority for the grant, by the Court, of the object of the complainant's bill, is asked for. Where is the case in which such relief has been sought? Where is the instance in which it has been given? It is true, that on the application of Rhode Island, commissioners have at different times been appointed by Massachusetts, and those commissioners have met with commissioners appointed on her part. This is a proper course of proceeding between states. A sovereign state must be heard, whatever may be the subject of her complaint. Subjects in controversy between states are not to be settled without delays and grave consideration. Respect is always to be given to applications by states to other political communities. But with all this courtesy and just regard to the dignity and just right of the state of Rhode Island to be respected,

*250 the state of Massachusetts has never receded from the line established by the Woodward and Saffrey station. Those acts of conciliation and * international civility, do not affect the agreements of 1710 and 1721; it being admitted, that the possession of Massachusetts is in exact harmony with them.

Thus, in international law, the case is against Rhode Island.

But we are willing to consider the case, as one to be decided by the rules of Equity pleading.

The complainant's bill would have been bad on a demurrer, in a Court of Equity; because it sets out a bar to the defendant's case, and does not set out sufficient to destroy it. Possession, in a Court of Equity, is as certain a title to land, as in a Court of Law. It is now held that a party may defend himself in equity by possession, as well as at law. Elmondorf *vs.* Taylor, 10 Wheat. 152. 6 Cond. Rep. 47.

It is to be considered by the Court that every thing stated in the plea is true. This is the necessary consequence of the position in which the complainant is placed, by the effort he now makes to show the Court the plea is insufficient.

It is admitted, the agreements between Rhode Island and Massachusetts of 1710 and 1721, were fair, and were made with full knowledge of the subject of the agreements, or with a full opportunity to obtain such knowledge. Possession accompanied those agreements, and was entirely consistent with them; and they have never been rescinded or abandoned.

This brings back the argument to the question of mistake. It is said that the plea shuts out Rhode Island from her proof. But Rhode Island can prove nothing more than she has stated in her bill. Take all that is stated in the bill to be true; and Massachusetts alleges it is not sufficient to set aside the agreements.

This Court cannot know more than the commissioners on behalf of Rhode Island, and on behalf of Massachusetts, knew in 1710. The ground of assertion of mistake is not sufficient to open the controversy.

Can controversies be never settled when parties say there has been a mistake? 2 Powell on Contracts, 90. The unreasonableness of a contract is not a ground to set it aside.

Another well established principle is, that when a thing is doubtful and uncertain, a settlement between the parties is conclusive. Powell on Contracts, 125. 1 Ves. Sen. 408. 1 Story's Equity, 163. 1 Mad. Chan. Pract. 62, 63.

It is said the defendant has not answered the bill: but this is the very question before the Court. The plea and answer of the defendant are now under examination; and it will be for the Court to decide upon their sufficiency,

and whether they will sustain the defendant's claim to be dismissed from any further action in the case. If the party had deemed the plea insufficient, he might have excepted to it, and have brought in other matter. This he has not done; but he asks the Court to decide on the insufficiency of the plea and answer.

This is altogether irregular. 1 Story's Equity, 528, sect. 684. Mitford's
*251 Pleading, 200. Beames' Equity, 248. 1 Vernon's Rep. 185. * Cooper's Equity, 284. 5 Mad. Rep. 328, 330. Adams *vs.* Thorpe, 4 Johns. Ch. Rep. 693.

What is it that the defendant should have denied? The rule of a Court of Equity is, that the plea or answer should deny the final result of all the allegations; not each particular matter which may in itself be true. The permission which is given to the defendant to deny the whole charge of the bill, is essential to the existence and validity of a plea in bar. Beames' Equity, 37. 5 Brown's Parl. Cases, 552. Gilbert's Equity, 184. Cooper's Equity, 328.

There must be something, not denied by the plea, upon which the Court can give a decree for the plaintiff. If there is not enough left undenied, sufficient to make a case for relief or recovery, none can be granted. The plaintiff might allege twenty facts, either quite immaterial, or even, perhaps, material in some degree, or as matter of evidence, which the defendant could not deny. For instance, the complainant avers that Dudley and Jenckes did not go on the ground to examine it. The defendants are not obliged to deny that; for the agreement may be good, if fair, though the fact were as is averred. So the bill avers the discontent of Rhode Island; an ex parte line having been determined upon. That may be so; but that does not set aside the agreement. Massachusetts, it is asserted, appointed commissioners to meet commissioners appointed by Rhode Island. That may be so; but the agreement was in full operation.

Every thing alleged to have happened after 1719 is called for, for the purpose of proving some wa[i]ver, recession, or abandonment of the agreement. If that were not the design, it had no object.

Now the plea meets and denies the general fact, which all these things are said to prove. Denying the general fact, we need not deny each of the circumstancs relied upon as proof.

There is a difference in this respect between the case now before the Court, and a case where fraud is charged. Any fraud, little or great, vitiates: every mistake does not. Any one circumstance amounting to fraud, proves fraud.

Suppose the complainant had charged, in direct terms, an abandonment of the agreement of 1710: it would have been enough for the defendant to have denied the abandonment in general terms.

Mr. Chief Justice TANEY, delivered the opinion of the court.

When this case was last before the Court, Massachusetts had not made her election, whether she would continue her appearance to the suit, or withdraw it according to the leave previously granted. She has since that time made her election, by putting in her plea to the amended bill of the complainant; and both parties are now regularly before the Court.

In the present stage of the case, the question is upon the sufficiency of the plea, as a bar to the relief sought by the complainant's bill. The object of the bill is to establish the boundary between the two states, according to their respective charters; and to be restored to the right of jurisdiction and
*252 sovereignty over that portion of her * territory of which she alleges that Massachusetts has unjustly deprived her.

The bill states the various charters from the crown to the colonies of Massachusetts and Rhode Island, from 1621 to 1691; and avers that, by virtue of the charter of Rhode Island, the boundary between her and Massachusetts was a line run east and west, three miles south of Charles river, or any or every part thereof; that the place of the said line being unsettled and in dispute between the two colonies, commissioners were mutually appointed to ascertain and settle it; that these commissioners met in 1710; and that the commissioners of Massachusetts then represented that a certain Nathaniel Woodward and Solomon Saffrey had, a long time before, ascertained the point three miles south of Charles river, and had set up a stake there; and that the commissioners of Rhode Island, relying on these representations, and believing them to be true, entered into the agreement of 1710, which is recited at large in the bill; and which adopts the place marked by Woodward and Saffrey, as the commencement of the line between Massachusetts and Rhode Island.

The bill further states, that no mark, stake, or monument at that time existed; and that the persons who consented to the pretended agreement, did not go to the place where it was alleged to have been set up, nor make any survey, nor take any measures, to ascertain whether the place was, in fact, three miles, and no more, south of Charles river.

That the said agreement was never assented to nor ratified by the colony or the state of Rhode Island; and that the tract of one mile in breadth, referred to in the agreement, was never conveyed to or enjoyed by the town of Providence, or the colony of Rhode Island; and that no persons appointed by the governor and council of the said two governments of Massachusetts and Rhode Island, within the space of six months from the date of the agreement, or at any other time, showed the line of Woodward and Saffrey or raised or renewed any marks, stakes, or other memorials, according to the terms of the said pretended agreement.

The bill then proceeds to state the continuance of the controversy about the boundary, and the appointment of commissioners by both colonies, in 1717 and 1718; that they met in 1718, and that the like representations, as those charged to have taken place at the former meeting of the commissioners, were again made by the commissioners of Massachusetts; that they were again believed by the commissioners of Rhode Island; and the agreement of the 22nd of October, 1718, executed by them under that mistake. This agreement is set out at length. The complainants aver that the commissioners did not go to the place where the stake was alleged to have been set up, nor make any survey in relation to this agreement. These averments are, in substance, the same with those made in relation to the agreement of 1710. The bill then sets out an order of the General Assembly of Rhode Island, directing the return of the commis-
*253 sioners * to be accepted and placed to record on the colony book; but the complainants aver that the last mentioned agreement was never ratified by either Rhode Island or Massachusetts.

The bill then sets out the running of the line, under the belief on the part of the Rhode Island commissioners, that it was only three miles south of Charles river, when it was in fact more than seven; sets out, at large, their report of the running, which is dated May 14th, 1719, and that the return was approved by the General Assembly of Rhode Island; but the bill avers that the

persons who signed that report, were never authorized by Rhode Island to run, agree upon, or report said line, and had no legal authority to act in the premises; and that Massachusetts, about the time last mentioned, wrongfully possessed herself of the disputed territory, and has held it ever since.

The bill further states that the line run as aforesaid was never established by any act binding upon the complainant; on the contrary, she has always claimed that the true dividing line was three miles south of Charles river: that she has never acquiesced in the claim of Massachusetts to a different line; and that the claim of Rhode Island was publicly and frequently urged by the colony, and by the freemen and inhabitants thereof; that all the proceedings of Rhode Island before mentioned, were founded on the mistaken belief that the stake set up by Woodward and Saffrey, and the line run as aforesaid, was only three miles south of Charles river; that this mistaken belief continued until about 1749; that controversies existing during that period between the citizens of the two colonies in relation to the boundary, Rhode Island, in the year last mentioned, appointed certain persons to run the line, when it became manifest that the line run as above mentioned in 1719, was more than three miles south of Charles river.

The bill then states the negotiations and other proceedings of the two colonies in relation to this boundary; that commissioners were appointed on both sides to run the line; that it was actually run, as now claimed by the complainant, by the commissioners of Rhode Island, in the absence of the commissioners of Massachusetts; who refused to attend. All of these things are particularly set out in the bill; and also that Rhode Island attempted to obtain the decision of the king in council; and the failure is accounted for by the poverty of the colony at that time, and the war which shortly afterwards broke out between France and England; that the war of the Revolution, which soon followed, interrupted and defeated the attempt to obtain the decision of the king in council; that in 1782, the legislature of Rhode Island again took up the subject, and appointed a committee, who reported in favour of the claim now made by the complainant; that in 1791, the two states mutually appointed commissioners to adjust this boundary, who met together in that year; and at that meeting, the commissioners on the part of Massachusetts acknowledged, and also set forth in their report subsequently made to the legislature, that the pretended agreement of 1719, here in before mentioned, had never been ratified either by
*254 Massachusetts * or Rhode Island, which report was accepted by the legislature; that the commissioners of the two states, being unable to agree upon the boundary, entered into a written agreement, which is set out in the bill, recommending to the two states to submit the matter to indifferent men of the neighouring states; or to unite in an application to Congress to settle the same agreeably to the respective charters, and the Constitution of the United States; that the said commissioners, in 1792, reported their proceedings to their respective states, and the agreement made by them, as aforesaid: which said reports were received and accepted by the legislatures of Massachusetts and Rhode Island, the one made to Massachusetts being set out at large, as an exhibit to complainant's bill; that other commissioners were afterwards appointed on both sides, and were continued until the year 1818; that they had several meetings, but were unable to agree upon and settle the line.

The bill then charges that Massachusetts has wrongfully continued to hold possession, and exercise jurisdiction within the charter boundary of Rhode Island; that the agreements of 1710, and 1718, were unfair and inequitable, and executed by mistake, as before mentioned; that the line as run, is not in a west course from the place of beginning, but is south of a west course, thus taking in a part of Rhode Island, even according to the point alleged to have been ascertained and marked by Woodward and Saffrey; that the agreements of 1710, and 1718, here in before mentioned, were never ratified by Massachusetts or Rhode Island; and if they had been so ratified by the colonies, they would not have been binding without the consent of the king in council, which was never given to either of them.

And the bill concludes with an averment that Rhode Island has uniformly resisted the claim of Massachusetts; has never claimed or admitted any other boundary than the one according to the charter; and prays for an answer to all the matters charged, and to sundry special interrogatories put in the bill: and that the northern boundary of the state may be ascertained and established, and Rhode Island restored to the exercise and enjoyment of her rights of jurisdiction and sovereignty over the territory to which she is entitled by her charter limits.

To this bill Massachusetts has put in her plea and answer; in which she sets forth, that in the year 1642, for the purpose of ascertaining and establishing her true southern boundary, a station, or monument was erected at a point then believed to be on the true and real boundary line of the said colony, and a line continued therefrom westwardly to Connecticut river; that the said station or monument then became, and ever since has been well known and notorious, and then was and ever since has been called Woodward and Saffrey's station; that Massachusetts afterwards held and possessed jurisdiction up to this line, and while she so held and possessed it, about the year 1709, a dispute arose between the two governments of Massachusetts and Rhode Island, respecting this
*255 * boundary line, and commissioners were appointed by both colonies to settle it; and that whatever they should agree upon, should forever after be taken to be the stated lines and bounds; that the commissioners met, pursuant to their authority, and entered into the agreement of 1710, which is set out at large.

The plea then avers, that the whole merits of the complainant's claim, was heard, tried, and determined by this judgment and agreement of the commissioners; that the agreement was fair, legal, and binding between the parties; and was in all respects a valid and effectual settlement of the matter in controversy; and was had and made without fraud, covin, or misrepresentation, and with a full and equal knowledge of all the circumstances by both parties; and that the same is still in full force, no way waived, abandoned, or relinquished: that Woodward and Saffrey's station was then well known, and the place where it was fixed a matter of common notoriety; and the line run therefrom capable of being shown and ascertained, and the marks, stakes, and memorials there, are easily capable of being discovered and renewed; and that the defendant has held and possessed the land, property, and jurisdiction, according to the said station and the line running therefrom, from the date of the said agreement to the present time without hinderance or molestation. The plea then sets forth the proceedings of Massachusetts and Rhode Island, in 1717, appointing commissioners to settle the boundary; the meeting of these commissioners, and their

agreement in 1718, which is set out at large in the plea; and which the defendant avers was accepted by Rhode Island, and caused to be duly recorded, and that the same was thereby ratified and confirmed.

The plea further avers, that no false representations were made on this occasion by the commissioners of Massachusetts; that the agreement was concluded in good faith, with a full and equal knowledge of all the circumstances, by the respective parties; and that the same has never been rescinded or abandoned; that it was made in pursuance of the first agreement before mentioned, in 1709, and in completion thereof; the plea then sets out at large, the report made by the commissioners in 1719, stating the manner in which the line was run; and avers that the report was approved by the General Assembly of Rhode Island, on the 16th of June, 1719; and that from the date of said agreement to the present time, Massachusetts has possessed all the territory, and exercised jurisdiction over the same, north of the said line, as prescribed in the said agreements of October, 1718, without hinderance or molestation.

The plea then says: "And the said defendant doth plead the said agreement of January 19th, 1710; and the said agreement in pursuance and confirmation thereof of the 22nd of October, 1718, and unmolested possession according to the same from the date of the said agreements, in bar to the whole bill of complaint of the said complainant, and against any other or further relief therein; and doth pray the judgment of the Court, whether the said defendant
*256 * ought further to answer the said bill, and that said defendant may be dismissed with costs in this behalf sustained."

Then follows an answer in support of the plea, which is unnecessary to repeat. The plea was set down for argument, upon the motion of the complainant; and the question now to be decided is, whether this plea is a bar to the complainant's bill.

In the view we have taken of the subject, it has become necessary to set out, in much detail, the contents both of the bill and the plea, in order to show the principles on which the opinion of the Court is founded. The controversy concerns, altogether, the southern boundary of Massachusetts, and the northern boundary of Rhode Island. The bill sets out the judgment given in 1684, in the Court of Chancery of England, declaring the original charter of Massachusetts to be vacated, and that the enrolment of the same should be cancelled; and also sets forth the letters patent afterwards granted to Massachusetts by William and Mary, in 1691, which was subsequent to the charter of Rhode Island. How far this fact may or may not be material, it would not be proper for us now to inquire. We advert to it merely to show the character of the controversy. The complainant insists in her bill, that Massachusetts has encroached upon her; and instead of coming three miles south of Charles river for the southern line the one to which she claims and holds is more than seven. The defendant, it will be observed, does not, in her plea, deny that the charter line of Massachusetts is such as the complainant describes; nor does the defendant deny, that the line to which Massachusetts now holds, and to which she insists that she has a right to hold, is four miles further south than that described in the charter; but she relies upon the circumstances set forth in her plea and answer, as conclusive proofs of her right, as against the complainant, at this time, whatever may have been the true boundary line between them according to the terms of the original charters.

The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a Court of justice; and we have no precedents to guide us in the forms and modes of proceedings, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing. The subject was however fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the Court determined to frame their proceedings according to those which had been adopted in the English Courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And acting upon this principle, it was then decided, that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was *257 founded, is fully stated in the opinion then delivered; * and upon re-examining the subject, we are quite satisfied as to the correctness of this decision. 12 Peters, 735. 739.

The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet, in a controversy where two sovereign states are contesting the boundary between them, it will be the duty of the Court to mould the rules of Chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading. And if it appears that the plea put in by the defendant may in any degree embarrass the complainant in bringing out the proofs of her claim, on which she relies, the case ought not to be disposed of on such an issue. Undoubtedly the defendant must have the full benefit of the defence which the plea discloses; but at the same time the proceedings ought to be so ordered as to give the complainant a full hearing upon the whole of her case. In ordinary cases between individuals, the Court of Chancery has always exercised an equitable discretion in relation to its rules of pleading, whenever it has been found necessary to do so for the purposes of justice. And in a case like the present, the most liberal principles of practice and pleading ought, unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength.

According to the rules of pleading in the Chancery Court, if the plea is unexceptionable in its form and character, the complainant must either set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, and denies the truth of the facts therein stated, he then admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery: and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. 6 Wheat. 472. Undoubtedly, if a plea upon argument is ruled to be sufficient in law to bar the recovery of the complainant, the Court of Chancery would, according to its uniform practice, allow him to amend; and to put in issue, by a proper replication, the truth of the facts stated in the plea. But in either case, the controversy would turn altogether upon the

facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the Court of Chancery in relation to pleas. In many cases, where they are not overruled, the Court will not permit them to have the full effect of a plea; and will in some cases save to the defendant the benefit of it at the
*258 hearing; and in others * will order it to stand for an answer as in the judgment of the Court may best subserve the purposes of justice.

In the opinion of this Court, it was evident from the argument we have heard, that if the plea stands, the case must be finally disposed of, upon an issue highly disadvantageous to Rhode Island. For by setting down the plea for argument, that state is compelled to admit the truth of all the facts stated in it, many of which are directly at variance with the allegations contained in the bill. Thus, for example, the complainant avers, that the persons who signed, in her behalf, the agreement of May 14th, 1719, had no legal authority to act in the premises. In the plea and answer of the defendant, it is averred that they had authority. The bill charges, that the Rhode Island commissioners acted under a mistake; that the commissioners of Massachusetts represented to them that the stake set up by Woodward and Saffrey was only three miles south of Charles river; and that they believed the representation, and acted upon it, when in truth the stake was seven miles south of that river. The plea on the contrary avers that the agreement was made with a full and equal knowledge of all the circumstances by the respective parties. There are differences also between the bill and the plea, in relation to the nature and character of the possession held by Massachusetts, of the disputed territory.

If we proceed to decide the case upon the plea, we must assume, without any proof on either side, that the facts above mentioned are correctly stated in the plea and incorrectly set forth in the bill. This is the rule of the Chancery law. Yet it is evident, that by deciding the case upon such an issue, we should shut out the very gist of the complainant's case; and exclude the facts upon which her whole equity is founded, if she has any. Because, if we assume, as we must do in this state of the pleading, that the agreements, which are admitted on both sides to have been made, were made by persons having competent authority to make them, and who had full knowledge of all the circumstances; and that Massachusetts had quietly and peaceably enjoyed the territory, under this agreement, for more than a century; every one, we presume, would admit that the claim of Rhode Island to unsettle this boundary, at this late day, was utterly groundless and untenable. Yet this is the attitude in which Rhode Island must stand upon the issue framed by the plea; the allegations in her bill, above mentioned, must be rejected as erroneous, without giving her an opportunity of proving them; and her claim to this territory must be decided, upon a statement of facts, the truth of which she utterly denies, and which she offers to prove are entirely erroneous, if the Court will consent to hear her testimony. We do not mean to say that the facts stated in the bill, if proved to be true, will entitle the complainant to recover. That point is not before us in the present state of the pleadings; and we give no opinion on the merits of this controversy. But certainly it would be unjust to the complainant not to give her an oppor-
*259 tunity of being * heard, according to the real state of the case between

the parties; and to shut out from consideration the very facts upon which she relies to maintain her suit.

If the complainant takes issue on the facts stated in the plea, her condition would be equally unfavourable. For there are many facts upon which the complainant evidently relies as material, which are altogether unnoticed in the plea, and upon which, therefore, no issue would be framed. And if the complainant were to adopt this alternative, she would admit, according to the Chancery rules of pleading, that all of the allegations contained in her bill were immaterial and of no importance, except those noticed in the plea: and that if the facts averred in the plea turned out to be true, the complainant had no right to recover, whatever equities might be found in the other allegations in the bill; and whatever proofs she might be ready to adduce in support of these allegations.

In either alternative, therefore, it would be manifestly unjust to the complainant, to decide this controversy upon the plea; and if it was deemed good in form and substance, so far as the case is already presented to the Court, we still should not finally decide the controversy on this plea, but save the benefit of it to the hearing, and give the complainant as well as the defendant, the opportunity of bringing forward all the merits of his case.

But the plea put in by the defendant cannot be sustained, even if this were to be treated as a suit between individuals, and tried by the ordinary rules of Chancery pleading. It is multifarious, and on that account ought to be overruled.

It is a general rule, that a plea ought not to contain more defences than one: Various facts, therefore, can never be pleaded in one plea; unless they are all conducive to a single point, on which the defendant means to rest his defence. This principle is so well established, that it is unnecessary to refer to many adjudged cases to support it. It is fully stated by Lord Hardwicke, in 1 Atk. 54, in the following words: "The defence proper for a plea must be such as reduces the cause to a particular point, and from thence creates a bar to the suit, and is to save the parties expense in examination; and it is not every good defence in equity that is likewise good as a plea; for where the defence consists of a variety of circumstances, there is no use of a plea, the examination must still be at large, and the effect of allowing such a plea, will be, that the Court will give their judgment on the circumstances of the case, before they are made out by proof."

The defendant, after stating the various proceedings here in before mentioned, which preceded and followed the execution of the agreements on which he relies, all of which conduce to a single point, that is, to show the obligatory and conclusive effect of those agreements upon both of the states, as an accord and compromise of a disputed right, deliberately made, and with full knowledge on both sides; proceeds to aver, "that the defendant has occupied and ex-
*260 ercised jurisdiction, and enjoyed all rights and sovereignty, according * to the same, from the date hereof to the present time." And he then sums up his defence in the following words:

"And the said defendant doth plead the said agreement of the 19th January, 1710, and the said agreement in pursuance and confirmation thereof of the 22d October, 1718, and unmolested possession, according to the same, from the date of the said agreements, in bar to the whole bill of complaint of the said complainant; and against any further or other relief therein."

The defence set up by this plea is twofold: 1. That there was an accord and compromise of a disputed right. 2. Prescription, or an unmolested possession from the time of the agreement, that is, of more than one hundred years. These two defences are entirely distinct, and depend upon different principles. If what the defendant alleges be true, then the agreements themselves conclude the controversy. For if, as the plea avers, there was a dispute between these two colonies, in respect to the boundary between them, and that dispute was settled by persons duly authorized to bind the respective parties; and if, as stated in the plea, the agreement of October 1718, to run the line from the stake set up by Woodward and Saffrey, was accepted, ratified, and confirmed by Rhode Island; and if the running of the line afterwards in 1719, pursuant to such agreement, was also approved by Rhode Island; then there can no longer be any controversy between them. They must, on both sides, be bound by the accord and compromise of those whom they had authorized to bind them, and whose conduct they afterwards approved; provided the settlement was made, as the plea alleges, with a full and equal knowledge of all the circumstances. The various facts stated by the defendant, in relation to these agreements, contribute to support them, and conduce to establish this point of his defence. And, assuming that the plea and answer are true in all these statements, then an accord and compromise is established, which was obligatory upon the parties from the moment it was finally ratified. And taking every thing averred by the defendant on this point of the defence to be correct, Rhode Island would have been as effectually barred as she is at the present moment, if she had commenced this controversy within a month after the accord was made. The lapse of time is not at all necessary to give validity to such a settlement; or to support the defence founded upon it. It is a matter entirely distinct from it; and if it has any operation in the cause, it is another defence, and one of a different character. It is not an accord and compromise of a doubtful right—it is prescription.

Rhode Island, indeed, avers, that the possession was constantly disputed on her part, and efforts made from time to time to regain it; and that it has always been an open question, since the error in the line was first discovered, down to the present time. But, as we have already remarked, when the plea is set down for argument, the statements contained in it are admitted to be true. And according to the allegations there made, this long possession was unmolested.

*261 In that state of the fact, separated from all the averments * of Rhode Island, the possession of more than one hundred years would become a rightful one by prescription; even if it had begun in wrong and injustice. The acquiescence of the adjoining state for such a lapse of time, would be conclusive evidence that she assented to the possession thus held, and had determined to relinquish her claims. The possession, therefore, if a defence at all, is a separate and complete one of itself; and forms no part of the accord and agreement alleged in the plea. Here, then, are two defences in the same plea; contrary to the established rules of pleading.

A few cases will illustrate these principles, and show what constitutes duplicity in pleading. In the case of Whitebread *vs.* Brockhurst, 1 Br. Ch. Rep. 404, where to a bill for a specific performance of an agreement, the defendant put in a plea which averred two facts: first, that there was no agreement in writing; and secondly, that there had been no acts done in part performance: Lord Thurlow overruled the plea as double, it containing two different points, and

therefore, proper for an answer. And in delivering his opinion on that occasion, he says, "the use of a plea here is to save time, expense, and vexation; therefore, if one point will put an end to the whole cause, it is important to the administration of justice that it should be pleaded; but if you are to state many matters, the answer is the most commodious form to do it in." We are aware, that this decision has been questioned. But it is quoted with approbation, and recognised as an authority, in 7 Johns. Ch. Cases, 216; where Chancellor Kent, speaking of the case of Whitebread *vs.* Brockhurst, says, "the reasoning of Lord Thurlow is supposed to be weighty and decisive; and since that time it has been the constant language of the Court, that the plea must reduce the defence to a single point, and that a defendant can never plead double."

Again, in the case of Claridge *vs.* Hoare, 14 Ves. 65, 66 Lord Eldon, in speaking of the case of Beachcroft *vs.* Beachcroft, where it had been held, that the plea of a release, with an averment that it had been acted upon, was multifarious, expressed his doubts of that decision, upon the ground that the release was effectual without being acted upon, and the latter averment might have been rejected as surplusage. The reasoning of Lord Eldon shows that if the second averment would have been a good point of defence, the plea would have been bad. The acting upon the release, in Beachcroft *vs.* Beachcroft, was altogether unimportant, and could not, if true, affect the rights of the parties. But not so, as to the possession here pleaded. If true, as pleaded, it is of itself a defence, and could not, therefore, be rejected as surplusage. The case of The Corporation of London *vs.* The Corporation of Liverpool, 3 Anst. Rep. 738, also illustrates and supports the principle we have stated. It is unnecessary, however, to multiply cases on this subject. They are all collected together in Story's Equity Pleading, where the subject is very fully examined. We hold it to be perfectly clear, that in the case of an individual, the plea of a release and of the
*262 statute of * limitations; or of an award and the statute of limitations; could not be united in the same plea. And if so, it would seem irresistibly to follow, that the accord and compromise, and the title by prescription, united in this plea, render it multifarious; and that it ought to be overruled on that account.

We have carefully avoided expressing any opinion upon the merits of this controversy; and have confined ourselves to the case as presented to the Court by the pleadings. The facts stated in the bill, and not noticed in the plea, are not yet admitted or denied; and consequently we do not know in what form the case may ultimately come here for decision.

In the case of Rowe *vs.* Teed, 15 Ves. 377, 378, Lord Eldon remarks, that "the office of a plea generally is not to deny the equity, but to bring forward a fact, which, if true, displaces it." A plea, therefore, in general, presupposes that the bill contains equitable matter, which the defendant by his plea seeks to displace. It is according to this principle of equity pleading that we have treated the case before us. If a defendant supposes that there is no equity in the bill, his appropriate answer to it is a demurrer; which brings forward at once the whole case for argument. The case of Milligan *vs.* Mitchell, 3 Cranch, 220, 228, illustrates this rule, and shows that the defence here taken was more proper for an answer or demurrer than a plea.

The course determined on recommends itself strongly to the Court, because it appears to be the only mode in which full justice can be done to both parties.

Each will now be able to come to the final hearing, upon the real merits of their respective claims, unembarrassed by any technical rules. Such, unquestionably, is the attitude in which the parties ought to be placed in relation to each other. If the defendant supposes that the bill does not disclose a case which entitles Rhode Island to the relief she seeks; the whole subject can be brought to a hearing by a demurrer to the bill. If it is supposed that any facts are misconceived by the complainants, and therefore erroneously stated; the defendants can put these in issue by answering the bill. The whole case is open; and upon the rule to answer which the Court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her own interests.

Mr. Justice M'Lean.

The Massachusetts charter was granted by King Charles the First, and is dated the 4th March, 1628. It conveyed to Sir Henry Rosewell and others, "all that part of New England, in America, which lies and extends between a great river, there commonly called Monomack, alias Merimac, and a certain other river called Charles river, &c.; and also all and singular those lands and hereditaments whatsoever, lying within the space of three English miles on the south part of the said Charles river, or of any or every part thereof," &c.

*263 * On the 8th July, 1663, King Charles the Second granted the charter of Rhode Island, "bounded on the west, or westerly, to the middle or channel of a river there, commonly called and known by the name of Pawcatuck river, and so along the said river, as the greater or middle stream thereof reaches or lies up into the north country; northward unto the head thereof, and from thence by a straight line drawn due north until it meets with the south line of the Massachusetts; and on the north or northerly, by the aforesaid south or southerly line of the Massachusetts colony or plantations," &c.

The line which limits Massachusetts on the south, and Rhode Island on the north, is the subject matter of controversy in this case. The bill states, that for many years after the Rhode Island charter was granted, the northern part of the colony, adjoining Massachusetts, remained wild and uncultivated; and the land was of little value: that a short time previous to the year one thousand seven hundred and nine, a dispute arose respecting the northern boundary; and that Massachusetts appointed one Joseph Dudley on her part, and the General Assembly of Rhode Island appointed and empowered one Joseph Jenckes on her part, to ascertain and settle the disputed line: that these persons met, together with one Nathaniel Paine, one Nathaniel Blagrove, and one Samuel Thaxter, of Massachusetts; and one Jonathan Sprague, and one Samuel Wilkinson, of Rhode Island; at Roxbury, in Massachusetts, the 19th January, 1710: and that the said Joseph Dudley, Nathaniel Paine, Nathaniel Blagrove, and Samuel Thaxter, represented to the said Jenckes, Sprague, and Wilkinson, that one Nathaniel Woodward and one Solomon Saffrey; who, they also represented to be skilful and approved artists; had, before that time, that is to say, in 1642, ascertained the point or place, three English miles south of the river called Charles river, or of any or every part thereof, and had there set up a stake: and that Jenckes, Sprague, and Wilkinson, relying on their representations, and believing the point or place

to have been ascertained, and that it was three English miles, and no more, south of Charles river, or of any or every part thereof; the said Dudley and Jenckes, in the presence of, and with the advice of, the other persons named; signed and sealed a certain writing, called an agreement, that the boundary should be run from the stake set up by Woodward and Saffrey.

And the complainant states, that no stake or monument at that time existed, by which could be ascertained the place where it was set up by Woodward and Saffrey: that the agreement was entered into without going to the place of beginning, and without ascertaining whether it was not more than three miles south of Charles river; and whether the line was run as stated in the agreement.

That neither the colony, nor the state of Rhode Island, has ever assented to or confirmed the agreement; nor has the town of Providence, nor the colony, enjoyed the tract of land specified in the agreement, of one mile in breadth, north of Woodward and Saffrey's line: that this line was not shown nor run in six
*264 months after the * agreement; nor were any marks, stakes, or other memorials made, to identify the place of beginning.

That this controversy respecting the line continued, and that Massachusetts, on the 18th June, 1717, enacted an order, in the words following: "The season of the year having been such, this spring, that the committee appointed in November last, to run the line between this government and the government of Rhode Island, could not attend the service, ordered: that the honourable Nathaniel Paine, Esquire, Samuel Thaxter, Esquire, and John Chandler, Esquire, be a committee to join with such as the said government of Rhode Island shall empower, to proceed in and perfect the running and settling the line between this province and the said colony, pursuant to the agreement lately made for that end by commissioners of both governments," &c. And on the 16th November, 1717, the General Court of Massachusetts resolved, that Nathaniel Blagrove, Esquire, be added to the committee. And afterwards the General Court resolved, that "whereas this house is informed that the government of Rhode Island have fully empowered the committee, which they have appointed, to run the line between this province and that government; to agree, compromise, and issue the governments on that affair, and finally settle the dividing boundary: Resolved, that if the said committee shall attend that service, so empowered, that the committee appointed by this Court to join in running the said line, be also vested with like powers; and are hereby fully empowered to agree, compromise, and issue the difference between the governments in the said affair; and to make a full and final settlement of the line between that government and this."

That on the 17th June, 1718, the Assembly of Rhode Island passed the following act: "Whereas the committee appointed and empowered by the General Assembly of this colony, at their sessions, on the first Wednesday of May, 1717, to perfect and settle the line between the said colony and the province of Massachusetts Bay, were bound up or restricted to an agreement made at Roxbury between Colonel Dudley and Major Jenckes, &c., so as the matter in difference between the two colonies, as to the stating and settling the said line hath been retarded, to the considerable charge of the colony, this Assembly, taking the premises under consideration, do hereby, enact, constitute, and appoint Major Joseph Jenckes, Major Randal Holding, Major Thomas Fry, Captain Samuel Wilkinson, and Mr. John Mumford, surveyor, a committee, to treat and agree

with such gentlemen as are or may be appointed and commissioned by Massachusetts to settle the line," &c.

That on the 2d October, 1718, the commissioners on both sides met at Rehoboth, and, after discussing the subject, entered into an agreement under their hands and seals, "that the stake set up by Woodward and Saffrey, in 1642, upon Wrentham plain, be the station or commencement of the line," &c.

The complainant alleges that this agreement was also entered into without examination of the place where the stake was originally set
*265 * up; and without ascertaining whether the place was not more than three English miles south of Charles river, or of any or every part thereof. That the Rhode Island commissioners believed the statements made to them on this subject, by the commissioners of Massachusetts.

The Rhode Island commissioners made a return of their proceedings to their legislature; who accepted it, and ordered it to be recorded.

On the 12th May, 1719, the commissioners on both sides ran the line, beginning at the place where it was supposed the stake had been erected by Woodward and Saffrey; but which stake was not found, and was more than seven miles from Charles river, or any or every part thereof. The commissioners made a return of their survey, which was received and approved of by the legislature of Rhode Island. But the complainant alleges that the persons making the survey were not authorized to act in the premises by Rhode Island. And the bill states the line was never confirmed by Rhode Island; that the colony maintained that the true line was to begin three miles south of Charles river: and the complainant avers that all the above proceedings and agreements were founded upon the belief that the point or place three English miles south of Charles river, or of any or every part thereof, had been correctly and truly ascertained by Woodward and Saffrey.

In the year 1750, the General Assembly of Rhode Island passed an act authorizing the boundary line to be run, and appointing certain persons to perform this duty. In the preamble to this act, it is stated that the line never has been settled and run according to the royal charter; and that divers persons have set forth their rights to the Assembly to be under the jurisdiction of Rhode Island, instead of that of Massachusetts. The commissioners appointed by this act, were authorized to meet any commissioners appointed by Massachusetts, and to settle the boundary, and run the line. But if Massachusetts should decline to act, then the Rhode Island commissioners were required to run the line agreeably to the charter, and make return of their proceedings.

It is stated in the bill, that commissioners were appointed by Massachusetts, but they declined to meet the commissioners of Rhode Island: who, after waiting two days near the place of beginning, proceeded, ex parte, to run the line, and make return thereof.

This report was accepted by the Assembly, and the commissioners were continued in office.

The bill then states, that the Massachusetts commissioners, appointed as above, made a report of their proceedings to the council, the 13th April, 1750.

The bill further states, that remonstrances were made to Massachusetts, against its exercise of jurisdiction over the country within the chartered limits of Rhode Island, so long as the royal government continued; that unsuccessful

attempts were made to bring the subject before the king in council; but
*266 the population of Rhode * Island being small, and her means limited, and war between England and France having soon after taken place, interposed insurmountable obstacles.

In the year 1782, on the petition of a large number of the inhabitants residing within the controverted limits, the Assembly of Rhode Island made a report in favour of its claim.

In the year 1791, the bill states, the legislature of Massachusetts passed an act, duly appointing Walter Spooner, Elisha Mayard, and David Cobb, commissioners, for ascertaining the boundary line between the said state of Massachusetts and the state of Rhode Island; and that in the same year, the Rhode Island Assembly passed an act, appointing William Bradford, Jabez Bowen, and Moses Brown, commissioners, for ascertaining the boundary. These commissioners met at Wrentham, in Massachusetts, in 1791, but they could not agree on the line. They, however, agreed, in writing, to measure from Charles river three miles south, as claimed by each state, as the place of beginning; and to recommend to their respective governments to have the dispute adjusted, by a reference of it to disinterested persons, or by application to Congress.

These commissioners reported their proceedings to their respective states. And the bill further states, that in the year 1809 the parties again appointed commissioners, who continued in office until 1818; but they were not able to settle the line.

The state of Massachusetts pleads in bar to the bill, that in 1642, for the purpose of ascertaining and establishing the true southern boundary line of the colony of Massachusetts, a station or monument was erected and fixed at a point then taken and believed to be on the true and real boundary line of said colony; and a line continued therefrom westerly to Connecticut river; which said monument or station then became and ever since has been well known and notorious; and then was and ever since has been called Woodward and Saffrey's station, on Wrentham plains; and after fixing of said station and running the line aforesaid, and after the granting of the charter of Rhode Island, and while all the territory north of said station and line was claimed, held, and possessed, and jurisdiction over the same exercised and enjoyed by Massachusetts, as parcel of her own territory, viz., in the year 1709, disputes having arisen between the two governments respecting the said boundary line, under an act of the Assembly, the governor of Rhode Island colony appointed Major Joseph Jenckes to meet with his excellency, Colonel Joseph Dudley, governor of Massachusetts, to settle the boundary; and it was declared that what they should agree upon should be forever after deemed the true boundary.

These persons met at Roxbury, in January 1710, 1711, and after a full discussion of the subject, agreed that "the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful and approved artists, in the year 1642, and since that often renewed, in the latitude of forty-one degrees and fifty-five minutes, being three English miles distant southward, from the southernmost part of the
*267 river called * Charles river, agreeably to the letters patent for the Massachusetts province, be allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island, and to be continued between the two governments, &c., as is deciphered in the plan and tract of that

line by Nathaniel Woodward and Solomon Saffrey, now shown forth to us, and is remaining on record in the Massachusetts government."

"And whereas, upon presumption, by mistake or ignorance of that line, the inhabitants of the town of Providence, in the colony of Rhode Island, have surveyed and laid out several lots and divisions of land to the northward of Woodward and Saffrey's line aforesaid, on the Massachusetts side; it is agreed that there shall be and remain unto the said town of Providence, and inhabitants of the government of Rhode Island, a certain tract land of one mile in breadth, to the northward of said line, as described and platted; beginning from the great river of Pautucket, and so to proceed at the north side of the said patent line of equal breadth, until it come to the place where Providence west line cuts the said patent line, supposed to contain five thousand acres, be the same more or less; the soil whereof shall be and remain to the town of Providence, or others, according to the disposition thereof to be made by the government of Rhode Island aforesaid. Nevertheless, to continue and remain within the jurisdiction of Massachusetts."

"And it was agreed that persons to be appointed respectively by the two governments, should attend the first good season, within six months, to show the ancient line of Woodward and Saffrey, and to raise and renew the marks and memorials of the same."

This agreement was signed and sealed by Dudley and Jenckes, in the presence and by the advice of Nathaniel Paine, Nathaniel Blagrove, and Samuel Thaxter, on the part of Massachusetts; and by Jonathan Sprague, and Samuel Wilkinson, on the part of Rhode Island. "And the said defendant avers, that the whole real and true merits of said complainant's supposed cause or causes of action, were fully heard, tried, and determined by the said Jenckes and Dudley; that the said agreement was fair, legal, and binding between the parties; and was in all respects and all particulars, a valid and effectual settlement of the matter in controversy, and was had and made without covin, fraud, or misrepresentation; and with a full and equal knowledge of all circumstances, by both parties."

And the plea further avers, that the 18th June, 1718, in order to perfect and complete the running and settling of the line in pursuance of the above agreement, Nathaniel Paine, Samuel Thaxter, and John Chandler, were appointed a committee by Massachusetts, to which was afterwards added the name of Nathaniel Blagrove, to unite with a committee that should be appointed by Rhode Island for that purpose. And they were fully empowered to agree and compromise the dispute. And Rhode Island adopted in its Assembly
*268 * the following act: "Whereas, the committee appointed and empowered by the General Assembly of this colony, in May, 1718, to perfect and settle the line between the said colony and that of Massachusetts, were bound up or restricted to an agreement made at Roxbury between Colonel Dudley and Major Jenckes, &c., so as the matter in difference between the two colonies, as to the stating and settling the said line, hath been retarded, &c. And the Assembly hereby enact, constitute, and appoint Major Joseph Jenckes, Major Randal Holding, Major Thomas Fry, Captain Samuel Wilkinson, and Mr. John Mumford, surveyor, a committee to treat and agree with the committee of Massachusetts; and a full power was given to settle and compromise the contro-

versy respecting the line. The said committees having met at Rehoboth, in Massachusetts, entered into an agreement under seal, that the stake set up by Woodward and Saffrey in 1642, upon Wrentham plains, be the station from which to begin the line which shall divide the two governments," &c.

This agreement, on the 29th October, 1718, was accepted by the General Assembly of Rhode Island, and recorded; and was thereby certified and confirmed by the same. And the plea avers that said Paine, Blagrove, and Thaxter, or either of them, made no false representation whatsoever to the commissioners of Rhode Island; but that the agreement was done and concluded fairly and in good faith, with a full and equal knowledge of all the circumstances, by the respective parties.

The plea states that the Massachusetts commissioners made a report of their proceedings, in regard to the place of beginning and the running of the line, which was approved by the legislature. And that from the date of said agreements to the present time, Massachusetts has possessed and enjoyed all the territory, and exercised jurisdiction over the same, north of the said line; and that the place where the stake was set up by Woodward and Saffrey is well known, and has ever been notorious since the stake was set up. And the aforesaid agreements, and the unmolested possession according to the same, are pleaded in bar.

And the defendant, not waiving said plea, pleaded as aforesaid, but relying and insisting on the same, by way of answer, in support of said plea, and to every thing alleged in said bill to show that the said agreements ought not to stand, and be allowed as good and conclusive against the parties, and a valid and effectual bar, &c., saith that the said agreements, &c., were fair and legal, obtained without fraud or misrepresentation, and with a full and equal knowledge of all circumstances in both parties; and that it was a valid and effectual settlement of the matter in controversy; and that it never has been in any way rescinded, abandoned, or relinquished.

This case having assumed the forms of a Chancery proceeding, the established rules of Chancery pleading must govern it. In this mode the points for decision are raised; but the Court, in deciding the questions involved,
*269 may apply principles of the common law, * of Chancery, or of national law; as they shall deem the circumstances of the case require.

The plea sets up certain agreements in bar of the relief prayed for, which substantially appear upon the face of the bill; and it is insisted that, in such case, a demurrer, and not a plea in bar, is the proper mode of defence; that the great object of the bill is to set aside these agreements; and that, under such circumstances, they cannot be pleaded in bar.

On general principles, it would seem to be unreasonable that the complainant, by stating the matter in bar in his bill, should prevent the respondent from pleading it. And such is not the established rule in Chancery pleading.

A plea is a special answer to the bill, and generally sets up matter in bar, which does not appear in the bill; but this is not always the case.

An award may be pleaded to a bill, to set aside the award and open the account. Mit. 260. 2 Atk. 501. 3 Atk. 529. 644.

If the plaintiff, or a person under whom he claims, has released the subject of his demand, the defendants may plead the release in bar of the bill; and this

will apply to a bill praying that the release may be set aside. Mit. 261. 1 Atk. 294. 6 Madd. 166. 2 Sch. and Lefr. 721. 3 P. Wms. 315.

If a bill be brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit. 3 Bro. P. C. 558. 2 Eq. Ca. Ab. 177. 7 Viner. Ab. 398. 3 P. Wms. 95.

These authorities show, that a plea in bar may embrace matters stated in the bill. Where the matters in defence are fully stated in the bill, and it contains no allegations which it is necessary to deny by a plea, and by an answer, in support of the plea, a demurrer should be filed.

A question in this case is made, whether the plea is not multifarious, and, consequently, bad?

The rules which govern a special plea at law, are substantially the same as apply to a plea in Chancery. It must be single, and not double. Its office is, to bring forward a fact, which may be the result of a combination of circumstances; and which, if true, bars the relief prayed for in the bill. 15 Ves. 377. A plea, in order to be good, must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defence. Story's Eq. Pl. 497. 4 Sim. Rep. 161. 7 Johns. Ch. 214. Beames' Pl. in Eq. 10. But, although a defence offered by way of plea should consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good. Thus, a plea of title derived from the person under whom the plaintiff claims, may be a good plea, though consisting of a great variety of circumstances; for the title is a single point, to which the cause is reduced by the plea. So a plea of conveyance, fine, and non claim, would be good, as amounting to one title. Cooper's Eq. Pl. 225.
*270 * Beames' Pl. in Eq. 18. Mit. Eq. Pl. 296. The result of all the authorities is, that various facts may be pleaded if they conduce to a single point, on which the defendant means to rest his defence. And by this rule the plea in this case must be tested.

The defendant pleads in bar to the right asserted in the bill, the establishment of the Woodward and Saffrey station, as the place where the contested boundary line is to commence, and from which it was in fact run. And to support this, the agreements of 1710 and 1718 are relied on, and also the unmolested possession according to the same.

These agreements, and the unmolested possession according to them, are facts and circumstances which conduce to prove the right or title asserted in the plea. They are consistent with each other; and can in no correct sense be considered as tending to establish distinctive grounds of title.

The two agreements are substantially the same; and the unmolested possession, according to the agreements, is a consequence which naturally follows, and tends very strongly to confirm them.

The important fact asserted in the plea is, that the controversy was amicably adjusted between the parties by the establishment of the line; and there is not a fact or circumstance averred in the plea, which does not go to support this main fact. This plea then cannot be multifarious. The point relied on is single and distinct, although it is established by a variety of facts and circumstances.

Mere surplusage will not render a plea multifarious, or double. Beames' Pl. in Eq. 19, 20. In Story's Eq. Pl. n. 3, it is remarked, what constitutes

duplicity or multifariousness in a plea, is sometimes a matter of great nicety upon the footing of authority. A plea cannot contain two distinct matters of defence; for, if more than one defence be admitted, it is well observed, there may be as many grounds of defence stated in a plea as in an answer; and this would defeat the object of the plea.

Where in a bill praying a conveyance for four estates, the defendant put in a plea of a fine as to one estate, and in the same plea, he put in a disclaimer as to the other estates, the plea was overruled; for the disclaimer was wholly disconnected with the plea of the fine, and the plea was therefore double. Facts unconsistent with each other cannot be pleaded, for this would set up two defences. But where the facts, however numerous, all conduce to establish one point, as in the plea under consideration, it is not multifarious. Story's Eq. Pl. 499.

This plea goes to the whole bill, and the matter in bar is clearly and distinctly averred. These averments must be sufficient to support the plea, and exclude intendments against the pleader. 2 Ves. 245. 2 Sch. and Lef. 727. 18 Ves. 182.

The defendant has filed an answer in support of his plea, and this is necessary where there are equitable circumstances stated in the bill, in favour of the plaintiff's case, against the matter pleaded. These allegations in the bill
*271 must be denied by way of answer, as * well as by averments in the plea. 6 Ves. 594. 2 Ves. and B. 364. In such case, the answer must be full and clear, or it will not be effectual to support the plea; for the Court will intend the matters so charged against the pleader, unless they are fully and clearly denied. But if they are, in substance, fully and clearly denied, it may be sufficient to support the plea; although all the circumstances charged in the bill may not be precisely answered. Mit. 298, 299. 2 Atk. 241. 1 Sim. and Stu. 568. 5 Bro. Pl. Ch. 561.

The answer goes to the whole bill, and it denies all fraud, misrepresentation, or unfairness; and every allegation in the bill which goes to show that the agreements set forth in the plea should not be binding and conclusive on the parties.

A question is made, whether this answer, which goes to the whole bill, and denies the same facts as are denied in the plea, does not overrule the plea.

This objection seems to derive some support from certain decisions made in the Exchequer, and which have been, somewhat loosely, copied into some of the elementary treatises on Chancery pleading. But these decisions have never been sanctioned by the High Court of Chancery in England; whose rules of practice have been adopted by this Court.

The rule is, that the answer must not be broader than the plea; but must, in support of the plea, deny fraud and all equitable circumstances alleged in the bill, which are also by a general averment denied by the plea.

The answer, when filed in support of the plea, forms no part of the defence. It is evidence which the plaintiff has a right to require, and to use to invalidate the defence made by the plea. 6 Ves. 597. In a note in Mit. 240, it is said, "that in the cases in the Court of Exchequer, it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea where it applies to matter which the defendant, by his plea, declines to answer; demanding the judgment of the Court whether, by reason of the matter stated in the plea, he ought to be compelled to answer so much of the bill."

If the plea goes only to a part of the bill, and prays the judgment of the Court whether he shall be compelled to answer the other part; and the answer goes to the whole bill, the answer being broader than the plea, overrules it. For the answer is to the part of the bill which it is the object of the plea not to answer.

As this plea extends to the whole bill, it is essential to its validity that such facts should be averred in it as shall make a complete defence. But it is not necessary in the plea to notice every allegation in the bill which does not involve the facts that constitute the bar.

Where the plea does not cover the whole bill, as where it only sets upon a matter in bar to a part of the relief sought in the bill, the other part of the
*272 bill must be answered. In the case under consideration, * the answer in support of the plea is not broader than the plea, and consequently does not overrule it.

I come now to examine the great question in the case; and that is, whether the matter in bar, set out in the plea, constitutes a good defence to the bill.

In entering upon this subject, it may not be improper to notice the hardship complained of by the plaintiff's counsel, in setting up the defence by a special plea.

It is said that the ground assumed is narrow and technical, and excludes the full merits of the controversy from being examined. That no opportunity is afforded the plaintiff to prove the mistake by the commissioners, in agreeing to Woodward and Saffrey's station as the place where the boundary line was to begin; and which is the main ground on which the bill prays for relief.

It is true, a plea somewhat narrows the ground of controversy. Whilst it must contain all the facts material to a complete defence, it need not be extended to all the allegations of the bill. And the plaintiff may either take issue on the plea, or admit the truth of it, by setting it down for hearing; as has been done in this case.

The office of a plea is to reduce the cause to a single point, and thus prevent the expense and trouble of an examination at large. But the matters stated in the bill, which are not denied by the plea, are admitted to be true. The case of the plaintiff then, as now to be considered, is as full and as strong as it is presented in the bill, where not denied by the plea. The averments of the plea are admitted to be true; and the question is, whether those averments, counteracted by any allegations in the bill, not denied by the plea, constitute a bar to the right asserted by the plaintiff.

The plea states that in the year 1642, Woodward and Saffrey erected a station or monument at a point then taken and believed to be on the true and real boundary of Massachusetts, on the south. And that in 1710, this station was agreed to be the true boundary, and the place from which the line should be run, by Dudley and Jenckes, commissioners appointed by Massachusetts and Rhode Island; and who were authorized to settle and establish the line. And that afterwards, in the year 1718, other commissioners were appointed by Massachusetts and Rhode Island, to whom ample powers were given to compromise and settle forever the boundary; and who established the same place of beginning. And that the report made to Rhode Island by its commissioners, setting forth the agreement, was accepted by its legislature, and duly recorded and ratified.

And the plea avers, that the Massachusetts commissioners were guilty of

no fraud or misrepresentation; and that both agreements were entered into with perfect fairness, and in good faith; and with full and equal knowledge by the parties. That the claims of the plaintiff, as set forth in the bill, were fully heard, discussed, and settled. And that Massachusetts has retained possession
*273 and exercised * jurisdiction over the country north of the line thus established, until the present time.

These are the facts, substantially, on which the defendant relies, as a bar to the plaintiff's bill.

The principal ground of relief alleged in the bill is, the mistake in fixing the place from which the line was to run more than seven miles south of Charles river; whereas by the charter of Massachusetts, it was to be but three miles south of that river.

By the charter, the boundary was declared to be "three English miles south of any or every part of Charles river."

Some doubt may arise from this phraseology, whether the three English miles are to be measured from the source of the southern branches of Charles river, or from the main channel of the river. And it would seem, from the establishment of the Woodward and Saffrey station, and other acts done in reference to this boundary shortly after the date of the charter, and when its language was at least as well understood as at present, that the measurement was understood not to be required from the body of the river. At that early day the country was a wilderness, and the land was of but little value; so that Massachusetts could have felt no very strong interest in establishing the line farther south than was authorized by the charter.

The bill alleges a mistake in this distance from the river, of the Woodward and Saffrey station by the commissioners of Rhode Island, in both of the agreements respecting the boundary; and this mistake is not denied by the plea. But, in the language of the plea, these agreements are now to be considered as having been fairly made, in good faith, without fraud or misrepresentation by the Massachusetts commissioners; and with an equal and full knowledge of the facts and circumstances of the case. And the inquiry is, whether a mistake committed under such circumstances affords a sufficient ground on which to set aside the agreements.

I will first consider the principles of this case, as they would apply to a controversy between individuals respecting a common boundary.

The mistake of a fact, unless it operates as a surprise or fraud on the ignorant party affords no ground for relief in Chancery. 1 Story's Eq. 160. 2 Ball and Beatt. 179, 180. 4 Bro. Ch. Rep. 158. 6 Ves. 24.

The ground of relief in such cases is, not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence or otherwise, the Court will not interfere. 1 Story's Eq. 160. 9 Ves. 275.

It is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the
*274 party to make the discovery; not an obligation in * point of morals only, but of legal duty. 2 Bro. Ch. 420. 1 Har. Eq. b. 1, ch. 3, 4, note n.

Equity will not relieve where the means of information are open to both

parties; and where each is presumed to exercise his own judgment. 2 Wheat. 178. 195. Where an agreement for the composition of a cause is fairly made between parties with their eyes open, and rightfully informed, a Court of Equity will not overhaul it; though there has been a great mistake in the exercise of judgment. 1 Ves. 408. 1 Story's Eq. 163.

In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a Court of Equity will not interpose. For in such cases, the equity is deemed equal between the parties; and when it is so, a Court of Equity will not interfere. 1 Pow. on Con. 200. 1 Madd. Ch. Pr. 62–64. 1 Story's Eq. 163.

The principles recognised by these authorities apply, in all their force and conclusiveness to the case under consideration. A greater number of authorities might be cited, but it cannot be necessary. The principles stated are founded on reason and the fitness of things; and they have been sanctioned by a uniform course of adjudication.

If these rules are to be respected, and the mistake alleged in the bill had occurred under precisely the same circumstances between individuals, it would seem to be clear, that there would be no ground for relief.

A controversy exists between individuals respecting a common boundary. One party claims that the line should begin at a certain point, and the other at a different one. Arbitrators are appointed, with full powers to settle and compromise the dispute, who establish the point as claimed by one of the parties. Some dissatisfaction is subsequently manifested by the unsuccessful party; and seven years after the first reference, a second one is made to other persons, who are vested with ample powers to settle and compromise the controversy; and they do settle it in exact conformity to the first award; and this second award is reported to the principals, who sanction it. In addition to this, the line or place of beginning established by the arbitrators, is the place claimed by the successful party, as his line, more than seventy-five years before the second award; and more than twenty years before the other party had any interest in the boundary. And the conduct of the arbitrators is free from any imputation of fraud or unfairness; all having equal and full knowledge of the matter in dispute, which was fully and fairly discussed and understood, and finally determined.

A case under these circumstances between individuals, to say nothing
*275 of the lapse of time and acquiescence, since the award, * would not seem to be very strongly recommended to the equitable interposition of the Court, on the ground that the arbitrators mistook a fact: a mistake not induced by the opposite party, or by misrepresentation, but into which the arbitrators of the unsuccessful party had innocently fallen, having as full a knowledge of the whole merits of the case as the arbitrators chosen by the other party.

Relief, which should set aside the award, and open up the controversy, under such circumstances, would create a new head of equity.

The mistake is admitted, because it is not denied by the plea; and this may be said to be a technical advantage of the plaintiff. For if the fact of mistake were to be tested by the circumstances of the case, it would be difficult to come to the conclusion that a mistake had really occurred. If it were admitted to have taken place, in the first award, it would require no small degree of

credulity to believe, that it again occurred in the second award, made seven years after the first one; and after much dissatisfaction had been manifested against the first award. This dissatisfaction could only have arisen, from the supposed fact that the boundary had been established too far south.

But as the case is now considered, the mistake alleged is admitted; but admitted under all the averments of the plea.

If the Woodward and Saffrey station be as many miles south of Charles river, as alleged in the bill; it would seem to be a more reasonable supposition that it was agreed to, under a construction of the charter, or on the principles of compromise than through mistake. But the mistake being admitted, still, as between individuals, there would be no sufficient ground for the interposition of a Court of Equity.

And if relief could not be given between individuals, can it be decreed under the same circumstances as between sovereign states. There are equitable considerations, which would seem to apply with greater force to controversies between individuals, than to those which arise between states. Among states, there is a higher agency, greater deliberation, and a more imposing form of procedure, in the adjustment of differences, than takes place between private individuals. Between the former, from the nature of the proceeding, mistakes of fact seldom occur; and when they do happen, it is rather a question of policy than of right, whether they shall be corrected.

I am inclined to think with the counsel on both sides, that the great question in this case should not be decided by the rules for the settlement of private rights.

The high litigant parties, and the nature of the controversy, give an elevation and dignity to the cause which can never belong to differences between individuals. It may be a simple matter to determine where a line shall be run; but when such determination may draw after it a change of sovereign
*276 power over a district of * country, and many thousand citizens, the principles involved must be considered as of the highest magnitude. The question is national in its character; and it is fit and proper that it should be decided by those broad and liberal principles which constitute the code of national law.

Vattel, in his treatise, 277, says, "When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators, chosen by common agreement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators: they have engaged to do this; and the faith of treaties should be religiously observed."

And again: "In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say that it is mani-

festly unjust; since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality."

And again, in page 178, he says, "Arbitration is a very reasonable mode, and one that is perfectly conformable to the law of nations, for the decision of every dispute which does not directly interest the safety of the nation. Though the claim of justice may be mistaken by the arbitrators, it is still more to be feared that it will be overpowered in an appeal to the sword." The author well observes, that the Helvetic republic, by a wise adherence to this mode of adjusting controversies among themselves, and with foreign countries, has secured its liberty, and made itself respectable throughout Europe.

These principles have been established by the common consent of the civilized world. And where they are invoked in the settlement of disputes between states, and the proceeding is characterized by fairness and good faith, it ought not to be set aside, and indeed cannot be; without, in the language of Vattel, proving by the clearest evidence that the award was the offspring of corruption or flagrant partiality. And if the determination of the arbitrators has the sanction of time as well as of principle, it is believed that history affords no instance where it has not been considered as absolutely binding on the parties. The peace of nations, and the prosperity of mankind, require that compacts thus formed should be held sacred.

*277 * The pretensions of Massachusetts in favour of the line as established by both arbitrations, commenced in 1642; and no other jurisdiction had been, at any time, exercised over the country north of this line. It was claimed before Rhode Island had a political existence. The elements of which it was afterwards composed, were, at the time this right was first asserted, mingled with the parent colony of Massachusetts, and with other communities and nations. And after they became embodied and organized under the charter of 1663, it was nearly half a century before there seems to have been any dispute respecting this boundary.

Nearly two centuries have elapsed since the claim of Massachusetts to this line was set up, and more than a hundred and twenty years since the controversy was settled by the commissioners or arbitrators chosen by the parties; and, as averred in the plea, specially sanctioned and confirmed by Rhode Island.

Is time to have no influence in this case on the agreements of the parties? It covers with its peaceful mantel stale disputes between individuals. And so strong is its influence, that fraud, which vitiates all human transactions, cannot be reached when covered by great lapse of time.

Has a treaty ever been set aside on the ground of mistake? Has it ever been contended, that after its ratification by the high contracting parties, either could look behind the treaty and object to it, because the negotiators had mistaken a fact? It is believed that such a pretension would be new in the history of diplomacy. The treaty must speak for itself; and under its provisions must the rights of the parties be ascertained.

In the first treaty of limits between this country and Great Britain; it is a fact not now questioned; that a mistake of many miles was made in estab-

lishing our northern boundary. But this has afforded to Great Britain no occasion of remonstrance or complaint.

Our own government, on a recent occasion, declined an acquiescence in the decision of the King of the Netherlands, in relation to this same boundary. But, in his letter of July 21st, 1832, to the representative of Great Britain in this country, the Secretary of State says, in relation to the resolution of the Senate against the decision; that it was adopted under the conviction that the arbiter had not decided the question submitted to him, or had decided it in a manner not authorized by the submission."

"It is not," he adds, "the intention of the undersigned to enter into an investigation of the argument which has led to this conclusion. The decision of the Senate precludes it, and the object of this communication renders its unnecessary; but it may be proper to add, that no question could have arisen as to the validity of the decision, had the sovereign arbiter determined on and designated any boundary as that which was intended by the treaty of 1783." This view, by the Secretary, of the binding effect of the decision if it had been made *278 on the point submitted to the arbiter, is in accordance * with the principles of national law, and has a direct and most forcible application to the case under consideration.

No objection is made by Rhode Island that the arbitrators exceeded their powers. No such objection can be made. Their powers were ample; and their proceedings, both in 1710, and in 1718, seem to have been characterized by great dignity and deliberation.

The complainant, it is true, was dissatisfied with the first decision, establishing Woodward and Saffrey's station; and by remonstrances induced the appointment of the second commission in 1717, which in the following year confirmed, in all respects, the first decision. Notwithstanding these remonstrances against the first decision, it would seem from the bill, that until 1749, the complainant believed that Woodward and Saffrey's station was only three English miles south of Charles river; and was consequently the true point from which the line should be run. This being the case, as the bill does not state the precise ground of dissatisfaction at the first report, it cannot well be imagined.

Rhode Island, it seems, from time to time, by remonstrances, in the form of resolutions and otherwise, and by the appointment of commissioners, signified its dissatisfaction at the boundary, as established in 1710 and 1718. Massachusetts, as it was bound in comity to do, listened to these expressions by Rhode Island; and more than once appointed commissioners on the subject. But whether we look to the averments in the plea, or to the statements in the bill, the defendant never seems to have done any thing which could impair the force of the agreements.

The bill states various facts, such as the little value of the land bounding on the disputed line for many years, the sparseness of the population, the want of means, and the intervention of war; as reasons why Rhode Island did not bring this controversy before the king in council, under the colonial government.

It appears from the exhibits accompanying the bill, that, in 1740, there being a dispute between Massachusetts and Rhode Island, whether the former could exercise its jurisdiction to the shores of the Narraganset bay, the King of

Great Britain appointed commissioners to settle the controversy, who decided against Massachusetts. This decision was confirmed on an appeal from the commissioners by the king and council.

So long as the colonial government continued, this mode of redress, so successfully invoked by the complainant in the above instance, remained open. The articles of confederation formed by the new government, made special provision for the settlement of disputed boundaries between states. And when these were revoked by the adoption of the Constitution, the tribunal at last appealed to was open; and has ever remained ready to hear and decide the controversy.

Giving full weight to all the allegations in the bill, which go to
*279 * excuse the delays of Rhode Island in asserting its claim, it is still difficult to say that the claim remains unaffected by the unmolested possession of Massachusetts, according to the agreements. Rhode Island, it is true, is small in territory, and weak in numerical force, but it has always stood high in moral power, and intellectual endowment; and the tribunals which, since the commencement of the controversy, have been open to hear its complaint, have been tribunals of reason, of justice, and of established law.

The arguments of the counsel for the complainant, zealous and able as they were, rested mainly on the hardship and injustice of deciding this controversy on the pleadings as they now stand. The mistake is admitted; and what is there else in the bill, taken in connection with all the facts and circumstances, which can give the case of the complainant a more imposing form. No fraud is imputed; the sealed agreements, now and ever, must speak the same language; the effect of time will remain; and the excuses alleged in the bill for delay, can scarcely have, under any form of pleading, greater effect than may be given to them as the case now stands. I speak not of the volume of evidence which may be thrown into the case by a change of the pleadings; but of the leading and indisputable facts which must, under any form of procedure, have a controlling influence in the decision. Believing, as I do, that in admitting the truth of the plea, Rhode Island has done nothing prejudicial to her interests; and that in the present attitude of the case, its substantial merits are before us, I feel bound to pronounce a different opinion from that which has been given by a majority of my brother judges. Taking the facts of the plea, and giving due weight to all the allegations of the bill, not denied by the plea, I am led to the conclusion that the bar is complete. In coming to this conclusion, I feel no want of respect for the state of Rhode Island, which has become so illustrious in our history by its enterprise, its intelligence and its patriotism.

Mr. Justice CATRON.

The facts and pleadings have been so fully stated by my brethren, as to require from me only a brief notice of the conclusions my mind has come to on the points in controversy.

The defence, in the form of an incongruous plea, must set up matter in bar, which, if true, renders immaterial every other fact alleged in the bill; be these as they may, the defence must be conclusive of the controversy; and every necessary averment to sustain the matter pleaded in bar, must also be made in an answer covering the plea, which cannot be permitted to stand unsupported by an answer. This is the familiar and settled practice of the High Court of Chancery in England; and adopted by rule in the Courts of the United States.

In form, it is believed, the plea and answer in this cause are accurate
*280 in a high degree, in regard to the matter pleaded, and the * averments necessary to give it effect, in the sense it is relied on as a bar; unless the defence set up be double.

It is insisted the plea is multifarious, because it relies on two defences: first, the compacts; and second, the possession and occupation of the territory claimed by the plaintiff, for more than a century.

The facts pleaded must be conducive to a single point of defence; and the question is, are the compacts, the making of the line in part execution of them, and the taking and holding possession in other part, and complete execution of them, combined facts and circumstances, conducing to establish the single point relied on in defence? That is, that the line run from Woodward and Saffrey's station was the true boundary, established by, and marked in execution of, the compacts; and that by the compacts Rhode Island is estopped to deny its validity. And I think the circumstances pleaded are so connected as not to vitiate the plea. If it is bad, it must therefore be so on its merits involving the obligatory force of the compacts. That they are prima facie conclusive of the boundary, is admitted: but the bill alleges they were made in mistake, and the line run and marked, and possession surrendered to Massachusetts, in mistake of a prominent fact: that Rhode Island then believed the station, and the line run from it, three miles south of Charles river; whereas subsequent observation and examination had ascertained it to be much further south, that is, about seven miles.

The Massachusetts charter calls for a line to be drawn east and west, "three miles south of the waters of said Charles river; or of any, or every part thereof;" and the plea, in substance, avers, the charter was construed, and the line settled by the compacts, without misrepresentation on the part of Massachusetts; and with full and equal knowledge of all circumstances by both parties.

The plea having been set down for argument, without an issue, must for the present be taken as true; and the averments taken as admitted, that the parties entered into the compacts, and established the boundary, with full and equal knowledge of all the circumstances of law and fact involved in the controversy, as it then existed, and now exists. And in the face of the compacts thus made, can Rhode Island be heard to allege the existence of a mistake in the boundary established by them; and marked by the mutual commissioners, and as the joint act of both parties? Under the circumstances, to open the controversy, and let in proof of a mistake; at this day, to overthrow a solemn treaty made between two independent governments; is deemed by me, inadmissible, not to say dangerous. And I think the matters pleaded (if true) a good defence. If this compromise and solemn establishment of a boundary, made a century ago, can be impeached on the ground of a mistake, so palpable and easy of detection; cannot every other made by the states be brought before this Court, on a similar assumption, usually much better founded; especially where de-
*281 grees of latitude * are called for as boundaries? If the parties, "with full and equal knowledge of all circumstances," compromised and settled a doubtful construction of the Massachusetts charter, and in which they were engaged nearly ten years; why should this Court go further into the matter, at the hazard of encouraging litigation in so many other quarters?

I will for the present refrain from entering into the inquiry, how far such a mistake of law, in construing a private instrument, could be inquired into by

a Court of Chancery in a suit between man and man; nor what help the mistake of law (if any exists) could derive from the facts apparent by the bill, unless the statement of the proposition should suggest the answer.

Nor will I attempt to draw the marked line of distinction between such private agreement, and a public treaty, by state with state; in regard to the difficulty of going into matters of mistake, usually not predicable of a treaty.

On consideration of the plea filed in this case by the defendant, and of the arguments of counsel thereupon had, as well in support of as against the said plea, it is now here ordered by this Court, that the said plea be and the same is hereby overruled; and it is further now here ordered by this Court, that the defendant answer the bill of complaint, as amended, on or before the first day of the next term.

State of Rhode Island and Providence Plantations, Complainants, v. State of Massachusetts.

Supreme Court of the United States, 1841.

[15 *Peters*, 233.]

The state of Rhode Island filed a bill against the commonwealth of Massachusetts, claiming that the boundary between the two states should be settled by the Supreme Court, according to the provisions of the original charters of the states, respectively; stating that the line which had been agreed upon by the commissioners acting for the states while colonies, had been agreed to by the commissioners of Rhode Island, under a mistake, and setting forth the charters of both the states, the proceedings of the commissioners, the acts of the legislatures respectively, and many other matters connected with the subject in controversy. To this bill the state of Massachusetts entered a general demurrer. The demurrer was overruled.

It is one of the most familiar duties of a Court of Chancery to relieve against mistake; especially where it has been produced by the misrepresentations of the adverse party.

The demurrer of the state of Massachusetts to the bill of Rhode Island, admits the charter lines of both the states to have been three miles south of Charles river; that the place marked, and from which the line was agreed to be run, was seven miles south of the river, instead of three miles, and was fixed on by mistake; and that the commissioners of Rhode Island were led into this error by confiding in the misrepresentations of the commissioners of Massachusetts. Now if this mistake had been discovered a few days after the agreement was made, and Rhode Island had immediately gone before a tribunal having competent jurisdiction to relieve against a mistake committed by such parties, can there be any doubt that the agreement would have been set aside, and Rhode Island restored to the true charter line? Agreements thus obtained, cannot deprive the complainant of territory which belonged to her, unless she has forfeited her title to relief, by acquiescence or unreasonable delay.

In the bill of Rhode Island, claiming to have an adjustment of the boundary between her and the state of Massachusetts, allegations are made of the interference of certain causes which prevented her resorting to measures for relief against a mistake as to the boundary line, alleged to have been established by the commissioners of Rhode Island

and Massachusetts. The state of Massachusetts, by the demurrer, admits these facts as stated; and the facts asserted in the bill of Rhode Island must be taken as true. It is, therefore, not necessary to decide whether they are sufficient to excuse the delay. But when it is admitted by the demurrer that Rhode Island never acquiesced, but has from time to time made efforts to regain the territory by negotiations with Massachusetts, and was prevented by the circumstances she mentions, from appealing to the proper tribunals to grant her redress, the Court cannot undertake to say the possession of Massachusetts has been such as to give her a title by prescription; or that the laches of Rhode Island has been such as to forfeit her right to the interposition of a Court of Equity.

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a Court of Equity. And where the fact appears on
*234 the face of the bill, and no circumstances are stated which take the case * out of the operation of the act, the defendant may, undoubtedly, take advantage of it by demurrer; and is not bound to plead or answer.

The time necessary to operate as a bar in equity, is fixed at twenty years by analogy to the statute of limitations.

It would be impossible to adopt the same rule of limitations in the case before the Court, on these pleadings. Here two political communities are concerned, who cannot act with the same promptness as individuals. Other circumstances in the case interpose objections. The boundary, in question, was in a wild, unsettled country, and the error in fixing the line not likely to be discovered until the lands were granted by the respective colonies and the settlements approached the disputed line. And the only tribunal that could relieve, after the mistake was discovered in 1740, was on the other side of the Atlantic, and was not bound to hear the cause and to proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident that a possession so obtained and held by Massachusetts, under such circumstances, cannot give a title by prescription.

THIS case was before the Court, at January term, 1838, 12 Peters, 657; and again, at January term, 1840, 14 Peters, 210.

A bill was filed in the Supreme Court, on the 16th of March, 1832, by the state of Rhode Island, and Providence Plantations, asking the Court to settle the boundary between that state and the commonwealth of Massachusetts.

Mr. Webster appeared for the commonwealth of Massachusetts.

After various proceedings in the case, a plea and answer to the bill of the state of Rhode Island were filed by commonwealth of Massachusetts; and, at January term, 1838, Mr. Webster, counsel for the commonwealth of Massachusetts, "moved to dismiss the bill, on the ground that the Supreme Court had no jurisdiction in the cause." A full report of the matters contained in the bill, and in the plea and answer, will be found in 12 Peters 659–669.

The question of jurisdiction was argued by Mr. Austin, Attorney General of Massachusetts, and Mr. Webster, on the part of the commonwealth of Massachusetts; and by Mr. Hazard and Mr. Southard, for the state of Rhode Island.

The Court ordered that the motion to dismiss the bill of the complainants should be overruled.

Afterwards, at the same term, 12 Peters, 755, Mr. Webster, in behalf of the state of Massachusetts, as her counsel and attorney in Court, moved for
*235 leave to withdraw the plea filed in the case * on the part of the state of Massachusetts, and also the appearance which had been entered for the state.

The Court, after argument on the 24th Feb. 1838, 12 Peters, 761, ordered, "That if the counsel for the state of Massachusetts shall elect to withdraw the appearance heretofore entered, that leave for the same be and was given; and the state of Rhode Island may proceed ex parte. But that, if the appearance be not withdrawn, that then, as no testimony had been taken, the parties be allowed to withdraw or amend the pleadings, under such order as the Court should thereafter make in the premises.

The appearance of the state of Massachusetts was not withdrawn; and the case was argued, on the sufficiency of the plea, at January term, 1840: the bill of the complainants having been amended. 14 Peters, 210.

On the 8th of January, 1841, the state of Massachusetts, by Mr. Austin, Attorney General of the Commonwealth, and Mr. Webster, "for himself," filed the following demurrer to the complainant's bill:

The defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true, doth demur to the said bill, and for cause of demurrer, showeth:

That no case is stated by the bill authorizing this Court to grant the relief sought, or any other relief:

That no such mistake or fraud is averred in the bill, as is sufficient to set aside the awards and agreements between the parties, therein stated, nor any other cause or reason sufficient for that purpose; and that these awards and agreements conclude the question:

That the bill states nothing which can do away the effect of the possession by Massachusetts up to the line asserted by her to be the true line, which possession the bill itself admits to have been continued for more than a century, and which possession is itself conclusive on the title:

That the bill states no case for the interference of this Court, with the line of division actually existing between two independent states, fixed by treaty, compact, or agreement between them, and acquiesced in for a century, as is true of this case, according to the bill itself:

*236 * That this Court has no power or jurisdiction to disturb or interfere with a boundary line actually existing between two states, well known and defined, and resting on early compact and long-continued acquiescence and possession, upon any allegation of fraud or mistake in the original transaction.

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, the defendant doth demur thereto, and asks the judgment of the Court, whether said defendant ought to be ordered to make any further or other answer to said bill; and prays to be hence dismissed with costs.

The demurrer was argued by Mr. Austin and Mr. Webster, for the state of Massachusetts; and by Mr. Randolph and Mr. Whipple, for the state of Rhode Island and Providence plantations.

Mr. Austin, for the respondents, in support of the demurrer.

The object of the plaintiff is, by a decree of this Court, to be confirmed and established in the title, jurisdiction, and sovereignty, which she sets up to a portion of territory, now and ever heretofore, in the possession, jurisdiction, and sovereignty of the respondent.

The bill describes this disputed territory with reasonable accuracy, so that it

is seen to be included between the present actual southern boundary of Massachusetts, and a line nearly parallel thereto, drawn between three and four miles due north from it, along the whole border of Rhode Island, comprising an area of about one hundred square miles.

The bill does not state that this territory is densely inhabited, and under a high state of improvement; but if the Court could judicially understand that it is occupied by seven thousand people, all of whom, as did their ancestors to remotest time, deem themselves to be citizens, and most of them native citizens of Massachusetts; and that there is upon it not less than a million of dollars of taxable property; the importance of the controversy could not be doubted.

The bill sets forth the alleged title of Rhode Island to the territory in dispute, and claims it as included in the charter of Charles II. It describes accurately the title of Massachusetts to the territory secured to her by her colonial and provincial charters, the one granted in 1629, and the other in 1691;
*237 and alleges * that her southern boundary is by a line, "three English myles on the south parte of the rivir called Charles rivir, or of any or every parte thereof;" and further alleges that the southern boundary of Massachusetts, and the northern boundary of Rhode Island, is by the same line; the one being contiguous to the other. All this is true.

The bill avers that the actual line of possession on the part of Massachusetts, is more than three miles viz.: seven miles south of Charles river, and of any and every part thereof. On this allegation, it is obvious the whole assumed merits of the plaintiff's case depend. If it be not true, there is no pretence of right to disturb the ancient and existing possession of the respondent.

Whether it be true or not, in point of fact, must depend on a legal construction of the words of the charter. As illustrative of that question, and not in the present aspect of the case, for any purpose of deciding it, the maps and plans of the territory heretofore used, and now before the Court, may be referred to.

By universal admission, the Charles river has one main, or principal stream, which is supplied by other streams or branches. If these latter streams, which have also local names, are any part of Charles river within the meaning of the charter, then the actual line of Massachusetts, which is within three miles of the principal branch, (sometimes locally called Mill river, at others, Jack's Pasture brook;) is the true boundary by her charter. If the main stream, and not the head waters, is alone entitled to be termed "Charles river, or any and every part thereof," then unquestionably the actual line of Massachusetts is not in conformity with the charter; because, in ancient times, it was assumed, and now is believed to be true, that the true point of off set for the protraction, southwardly of the line of three miles from any part of Charles river, is from the most southerly stream, branch or head waters of the river, and it was accordingly so drawn. It is believed that such is, and ever was the universal acceptance of the terms; and that wherever a different construction was put on the like phraseology, it was the construction made by power in violation of right.

But the case now stands before the Court on demurrer; and in this form of pleading, the counsel for Massachusetts very well understand that this
*238 question of fact is not open to discussion. * They are bound by the allegations of the bill, and must proceed to a hearing with this fact, pro hâc vice, against them; and with an admission that the line of actual possession is not the true line of the charter. It is with full confidence in the opinion that the bill, (even admitting this great and fundamental error on the part of Rhode Island, to be received as she has stated it,) does not set forth a sufficient cause for the interposition of this Court; that Massachusetts has ventured to waive this consideration for the present; and to deny that even on this presumption, Rhode

Island has any title, by her own showing, to the territorial jurisdiction which she demands by her bill. We suppose, indeed, this is already settled by this Court in effect, though not in form. The bill incorporates the defence of Massachusetts, on two other points; which, independent of the original accuracy of the boundary, are each, by itself, fatal to the plaintiff's demand. It admits the fact of an amicable settlement in 1710 and 1718, and the further fact of an actual possession on the part of Massachusetts, under and by virtue of such agreements, for now nearly a century and a half.

It is again obvious that the question of right between these parties depends,

1st. On the original correct location of the boundary line.

2d. On the effect of the agreements in establishing a boundary.

3d. On the undisturbed possession for more than one hundred years.

On the former hearing in this case, the respondent had filed a plea in bar, setting out, more fully than the plaintiff had done, the agreements of 1710, 1718; and relying upon them as fair and perfect contracts, made fairly, with full and equal knowledge, and accompanied and followed by an undisturbed possession from the time they were made.

We understood the Court to overrule that plea, because it contained two defences instead of one; upon a strict application of the severest rules of chancery practice, which, with great respect, we had contended could not apply to a case like the present, and were in no case applicable to the plea in the form in which it was presented.

*239 * In pronouncing the opinion of the Court, the Chief Justice said, "The defence set up by the plea is twofold:

1st. That there was an accord and compromise of a disputed right.

2d. Prescription, or an unmolested possession for more than one hundred years.

These two defences are entirely distinct, and depend upon different principles."

And after considering them separately, the Chief Justice further remarks, "Here, then, are two defences in the same plea, contrary to the established rules of pleading."

And again, upon the form of pleading, the opinion of the Court is to the following effect:

"A plea in general supposes that the bill contains equitable matter, which the defendant, by his plea, seeks to displace. It is according to this principle of equity pleading that we have treated the case before us. If a defendant supposes that there is no equity in the bill, his appropriate answer to it is a demurrer; which brings forward at once the whole case for argument. The case of Milligan *v.* Mitchell, 3 Cranch, 220. 228, illustrates this rule, and shows that the defence here taken was more proper for an answer or demurrer than a plea."

"If the defendant supposes that the bill does not disclose a case which entitles Rhode Island to the relief she seeks, the whole subject can be brought to a hearing by a demurrer to the bill." . . .

"The whole case is open, and upon the rule to answer which the Court will lay upon the defendant, Massachusetts is entirely at liberty to demur or answer, as she may deem best for her interests."

It seemed to us that the court having thus decided, not, indeed, that we had the two valid defences set forth in our plea, but that, if in truth we did possess them, either was in itself a bar, though both could not be joined in the then present form; permitted, if they did not invite us to present them under such form as would authorize a joinder of both, and a consideration of either, independent of the other. We had hope, therefore, that the plaintiff, having,

*240 as we think, admitted both in his own * declaration, would have been satisfied that whenever they were considered they would of necessity prevail.

The demurrer now joined presents these defences, with all others growing out of the plaintiff's own statement of the case. It is a familiar and well established principle, that if, taking the allegations to be true, the bill would be dismissed at the hearing, it may be dismissed on demurrer. Utterron *v.* Mair, 2 Ves. Jr. 95. The object of a hearing is only to inquire whether the allegations are proved, and the effect of them. When, therefore, if proved or confessed, a decree must be had for defendant, the defendant may safely admit them, and may therefore as safely demur to the whole bill. Kemp *v.* Pryor, 7 Ves. Jr. 245. Brooke *v.* Hewitt, 3 Ves. Jr. 253. Verplank *v.* Cacuis, 1 N. Y. Cases in Chancery, 59. Unquestionably, the legal effect of the facts admitted by demurrer or proof, may be a subject difficult to settle; but in a clear case of want of title, or equity, the result of a demurrer must be in favour of the defendant.

If, therefore, it shall now appear to the Court, by the fair import of the plaintiff's admissions in his bill, that notwithstanding any departure from the charter boundary, for good and sufficient cause, the colonies of Massachusetts and Rhode Island, by their authorized agents, settled the location of boundary on this frontier, such settlement is valid; and the Court must dismiss the bill.

Again, it appears to the counsel of Massachusetts, that if without any regard to the unascertained line described on paper in the charter of King Charles I., or any regard to any claim or any settlement with her neighbours, Massachusetts, in ancient times, entered on the disputed territory, more than 130 years ago, and has always possessed it, and exercised jurisdiction over it; that a title has been acquired by that possession, independent of all other title by grant or agreement, which this Court will not disturb. If the supposed agreement and the possession, or either of them, are admitted by the bill, it is then apparent on the face of the bill that the plaintiff has no cause of complaint, and on demurrer, the bill may be dismissed.

But in addition to these points of defence, the defendant has yet another on the face of the bill. The plaintiff, to recover, must depend on the strength *241 of his own title, not on the weakness * of the defendant's. The plaintiffs' title is set forth in the bill. It mainly depends on the charter granted to Rhode Island by Charles II., on 8th July, 1663.

Now, if under the circumstances of the case set out in the bill, at the time this charter was granted, the disputed territory was not in law created a part of the colony of Rhode Island then established, the plaintiff must fail on demurrer.

That it never passed by such charter to the then new colony of Rhode Island, we think could be made very clear by other records and proceedings, which history has preserved: but the question for this Court to settle on the present state of the pleadings will be, how does the title of the plaintiff appear on her own allegation in her bill?

It is proposed, therefore, to sustain the following propositions.

I. That, on the face of the bill, it sufficiently appears that the colony of Rhode Island, and Providence Plantations, never had and [any] charter title to the territory demanded.

II. That this territory never was any part of the state of Rhode Island.

III. That by the bill it sufficiently appears that if her title, as now claimed, ever vested by charter, still it is lost by force of the agreements of January, 1710, and October, 1718, and the proceedings of May, 1719, set forth therein.

IV. That there has been an adverse possession of more than one hundred years, apparent by the bill, which is conclusive against any other claim of title.

In considering the bill with reference to these propositions, two rules of law have an important bearing.

1. That although a demurrer admits all the facts well pleaded; it admits facts only, and not the conclusions of law. Ford *v.* Peering, 1 Ves. Jr. 76. 78. 2 Maddox Chanc. 224.

2. The plaintiff can have no better case on proof; and no remedy for any other case, than is stated in her bill.

This principle, however familiar, is in its exact application exceedingly important in this case. It has recently received the attention of this Court. Boone *v.* Chides, 10 Peters, 209. See also 4 Mad. 21. 29. 3 Wheaton, 527. 6 Wheaton, 418. 2 Wheaton, 380. 2 Peters, 612. 11 Wheaton, 103. 6 Johns. R. 559. 563. 7 Peters, 274.

*242 * To the first point then. How does Rhode Island claim the premises? Her title to any thing rests on her charter from Charles II., dated 8th July, 1663. In this charter she has no northern boundary, by natural objects or line of latitude. She is bounded on the southerly line of the Massachusetts colony or plantation. Where that line was, must be ascertained by examining the colony and plantation of Massachusetts; and in this position of the cause, it is admitted that the bill furnishes the only evidence. But it is well enough there stated. The colony of Massachusetts is the elder by thirty-five years. All the charters are set out in the bill. First, Is the grant of King James to the Council of Plymouth, in 1621, in which the southern boundary is described as "lying within the space of three English miles on the south part of the said Charles river, or of any, or of every part thereof."

Next is the deed of the council of Plymouth, to Sir Henry Rosewell and others, 19th of March, 1628, with the same boundary. Again follows the confirmation deed of Charles I., dated 4th of March, 1629, with the same description. Boston was settled in 1630, and the mouth of Charles river is on the west side of the city. Three miles south of it, would extend to Brookline, about thirty miles more northerly than the present claim of Rhode Island. It is not from the mouth of the river then, that the off set of three miles is to be drawn. At that period, and for many years after, the river was unexplored. The ancient maps, if it was proper to examine them, are all marvellously inaccurate.

In 1646, two persons called Woodward and Saffrey, and denominated "skilful approved artists," with or without authority, went into the interior to explore the country, make a map of it; (the map is before us, and has been lithographically copied by the council [counsel] of plaintiff;) find the south branch of Charles river, measure three miles, and erect a monument in perpetual remembrance of the thing. All this they did. The bill shows it.

They established the boundary, to begin in latitude 41° 55′.

The monument; the supposed boundary; the line thence to be drawn; became known and notorious.

Governor Dudley, of Massachusetts, on a solemn occasion, sixty-eight
*243 years after, proclaimed it. Governor Jenckes, of Rhode * Island, on the same occasion admitted it. All this is apparent on the bill.

This demarcation, and the notoriety of it, at that ancient time, in the wilderness, when it was important to draw a line, but of no importance where it should be drawn, was a practical construction of the charter, conclusive against all the world, unless indeed, the King of England might be an exception. He never objected, and his silence was consent.

Massachusetts, as the bill shows, being thus for twenty-one years without a neighbour, settled up to; and, in the language of that day, planted towards the line. Then the charter of Rhode Island was granted by Charles II., bounding

the colony of Rhode Island on the southerly line of the "Massachusetts colony or plantation," making no mention of the Massachusetts charter; but assuming, by this new word "plantation," for the first time applied to Massachusetts, that her actual occupation was her charter limits. The colony of Massachusetts was established by the royal charter, the plantation by the act of the people. The charter of Rhode Island recognises the existence of Massachusetts as, at that time, she existed in fact.

If the grant to Rhode Island was intended to include the space north of Woodward and Saffrey's station, which is nowhere so declared in the bill, and cannot be supposed, it would not convey any title from a grantor out of possession, and could therefore give, in this disputed territory, no claim to the colony. It is fairly to be inferred, that when a new colony was to be erected at the south of Massachusetts, and was bounded on the said colony or plantation, all the facts of the case were known; and that the boundary was intended to conform to an existing state of things, which had so long been possessed under a demand of right.

For forty-three years, the colony of Rhode Island submitted and acquiesced in this location. Now, although the title by possession forms a distinct subject of inquiry; yet, here it may be invoked, to show that Rhode Island took no part of this territory by her colonial charter. A charter, without possession under it, can form no evidence of title, after the revocation of that charter, on the
*244 4th of July, 1776. It is believed that the great respect paid * by this Court, in repeated cases, to the validity of crown grants, has not extended to give validity to any grant of which actual possession was not taken in a reasonable time; and that an adverse possession submitted to for forty-three years, is conclusive evidence that the territory in such adverse possession was not included in the terms of any other grant.

II. If this territory never passed to the colony, the state never had title to it; the claim of the state being only as successor to the colony.

III. It appears on the face of the bill, that a dispute arose between the two colonies in 1710, in regard to this line; and was settled by agreements or treaties of compromise, in 1710, 1718, 1719.

The bill distinctly alleges, 1st. A dispute or controversy.

2d. A commission to settle the controversy, commonly called the Roxbury commission.

3d. An unlimited authority to the commissioners of each colony by the legislature of each colony, to ascertain and settle the line.

4th. An actual settlement by an agreement, signed and sealed by the commissioners, so far as to fix a point of beginning; and to establish Woodward and Saffrey's monument as such point.

5th. That this settlement was a compromise; Massachusetts yielding one mile of soil in fee, and Rhode Island withdrawing all claim to jurisdiction over the disputed territory.

And the bill further admits a second commission, arbitrament, and award, or, more properly, a treaty; commonly called the Rehoboth agreement, by which other commissioners were appointed, with unlimited powers, to agree and settle the line "in the best manner they could;" and an agreement, as before, under seal, varying in some degree from the former, but precise, exact, and particular, and a subsequent running of the line accordingly, upon the earth's surface, being the line which, from that time to this, has been the actual dividing line between the two parties; and which the plaintiff now seeks to disturb. Having thus introduced the defendant's title into her bill, the plaintiff seeks to avoid it by several allegations. It is suggested not to have been within the legitimate power of the colonies to

make an agreement of boundary. To this, the case of Penn *v.* Lord Baltimore, 1 Ves. 444, is a sufficient answer.

*245 * The most material allegation is, that the agreement or treaty was the effect of a mistake. This mistake is thus stated.

The Massachusetts commissioners represented to the Rhode Island commissioners that Woodward and Saffrey were skilful and approved artists, and in 1642 had ascertained the point or place three miles south of Charles river, or of any and every part thereof; and had there set up a stake; and the Rhode Island commissioners, relying on said representations, and believing them to be true, and verily believing the said point or place to have been correctly ascertained, and the said place where the said stake was alleged to have been set up as aforesaid, to have been three English miles from Charles river and no more; the commissioners signed and sealed the agreement, which established the line of boundary.

To this the respondent replies, that it is the true character of this transaction, and not the name given to it in the plaintiff's bill, that is to lay the foundation for annulling an agreement otherwise binding upon the contracting parties.

The facts alleged are admitted by the demurrer; but whether they are to be called, or whether they amount to a mistake, is a conclusion of law, to be determined by the Court.

Now it is certain that to settle the boundary according to those charters, the commissioners must first have decided whether the head waters were a part of Charles river. It is apparent, also, that Woodward and Saffrey had, in their proceedings, determined that the head waters were part of the river; they had set up their stake accordingly, and when the Massachusetts commissioners affirmed that it was in the right place, they only affirmed that the head waters were part of the river; and when the Rhode Island commissioners relied on said affirmation, and believed it to be true, they believed the same fact.

It is observable, that the bill nowhere declares that the representation so made by the Massachusetts commissioners was wilfully false, or was intended to deceive, or that the Rhode Island commissioners acted or believed in consequence of such representation. These material allegations are carefully avoided.

It does not appear that the Rhode Island colony intended to settle the line according to the charter, without variation; but, on the contrary, that the

*246 commission was to "revise and compromise." * It is not averred that the Rhode Island commissioners intended to conform to the charter; but, on the contrary, it appears they were disposed to make an amicable settlement, and to take, in fee simple, an equivalent for territorial jurisdiction.

It is thus plain, on the averments of the bill, that what the plaintiff has been pleased to term mistake, was knowledge, compromise, reasonable concession, and judicious settlement.

All the subsequent proceedings having reference to this, depend on the same facts, and are not materially varied by the form of the bill.

But if this was a mistake by these commissioners, what is its equitable effect? "It must not be understood that in equity every kind of mistake is relievable, for though equity will relieve against a plain mistake, or misapprehension, or ignorance of title, yet equity will not interpose if the fact is doubtful, or, at the time of the contract, equally unknown to both parties; or if there has been a long acquiescence under the mistake, and neither party aware of it." Fonblanque, vol. i. p. 116, note to book i, ch. 2, sec. 7.

It appears by the bill that Rhode Island reposed under this mistake for forty years, without discovering her wrongs.

But this agreement and the subsequent ones are treaties. Ward's Law of Nations, ch. 15, p. 139. Vattel, ch. 12, p. 192, sec. 154.

"They are of a class of contracts which are never void for the mistake of the negotiators." Ib. 193, sec. 157, 158. See cases cited to this point when this case was last before the Court, 14 Peters, 210.

There can be found few cases where the negotiators of a treaty of boundary are supposed to have made a mistake; and none, it is believed, where, for any such cause, the provisions of a treaty were ever deemed to be, or ever were suggested by diplomatists to be void.

It is part of the law of nations, that a treaty, once made, is irremediably conclusive. And the reason is, that it can be inquired about and explained only by itself. The peace of the world demands that it be an eternal estoppel between the parties.

*247 The boundary of the United States, by the treaty of Paris, * of 1783; the designation of the River St. Croix, by commissioners under the Treaty of London, commonly called Jay's Treaty; and the results of the commission under the 4th article of the Treaty of Ghent, are all suspected, with more reason than the ancient treaty line of these colonies, to have been settled by mistake; but who ever was guilty of the gigantic heresy of maintaining that a mistake could be inquired about in these national compacts, or that the discovery of the ignorance of the negotiators would nullify the contract?

The bill shows an undisturbed possession by Massachusetts for one hundred and thirteen years, under claim of title.

The controlling power of time is a part of the law of this case, and reference is made to the authorities cited at the former hearing.

In addition to these, there is now presented to this Court, the written autographic opinion of Lord Mansfield, when Attorney General of England, in the year 1754, on the subject of this very boundary; in which that eminent jurist declares that "if the king approves the agreement, it is now too late for the parties to dispute it." 4th vol. Trumbull's MS. papers, Mass. His. Soc. Library.

Possession alone, it is respectfully contended, in a case of this kind, uninterrupted and exclusive for more than a century, is not only a good title, but the best of all possible titles. No other title gives, or was ever pretended to give, any right to the British crown to make conveyance of land or empire, jurisdiction or sovereignty in this new world. By discovery or by conquest, possession was obtained, and hence possession became ultimate right. When this possession was parted with, the right was lost, at least in effect against all the rest of mankind but the royal authority. Now, this possession was lost to the crown, and was gained by Massachusetts before the colony of Rhode Island was planted, or her charter drawn upon parchment. It is against, therefore, her own possession, or the possession of her grantor, forever, that the plaintiff demands title.

It has been suggested that it is not against claim of possession. To this it is submitted that no claim of possession can ever be admitted or considered in a Court of Equity, but that claim that is made in conformity to judicial

*248 proceedings. While this principle * is universally true, it derives additional force from the fact, that there always was a paramount power capable of redressing the injuries of the plaintiff, if at any time such injuries have been made known.

From 1740 to 1776 there was a regular appeal allowed to the King in Council. From the adoption of the confederation until the existence of the Constitution of the United States, authority to redress such injury vested in Congress. From that time to the present, this high Court has been the arbiter of international controversies between the states of the Union. The bill admits that no judicial effort has been made to bring the dispute to an issue. Occasionally, indeed, Rhode Island has complained. Once in about every thirty-five or forty years; that is,

once in every generation of statesmen, of which her soil has been prolific, she moaned over the loss of a right which she never possessed; but her murmurs never reached the temple of the law, and never were serious enough, or loud enough for that purpose.

She was too weak, or too feeble, or too poor, it may seem by the bill; and although we would not hear her enemy say this; yet, if it be admitted by demurrer, it is mere admission by form; for she never wanted the intellectual or moral qualities which such an exigency demanded.

But the admission of her distress may be safely made. It is as inoperative in law, as it is incredible in fact. Distress and embarrassment are no bars to the operation of time. Hovenden *v.* Lord Annesly, 2 Schoale & Lef. 632.

It remains only to inquire if the objections thus fatal on the face of the bill, may be taken advantage of by demurrer. To this point the Court is referred to the following cases. Mitford's Pleading, 99. 100. 102. 144, of the English edition. Kuypers *v.* Reformed Dutch Church, 6 Paige, 570. Humbert *v.* Trinity Church, 7 Paige, 195. Utterron *v.* Mair, 2 Ves. Jr., 95. Brooke *v.* Hewitt, 3 Ves. Jr., 253. Hardy *v.* Reeves, 4 Ves. Jr., 476. This case was reviewed and confirmed in Hovenden *v.* Lord Annesly, 2 Sch. and Lefroy, 632; and the opinion of the Lord Chancellor, 637, especially noticed. Hodley *v.* Healey, 1 Ves. and Beames, 536. Brooks *v.* Gibbons, 4 Paige N. Y. Rep. 374. 1 Jacobs and Walker, 195.

*249 * Mr. Whipple, for the complainants; with whom was Mr. Randolph.

The object of the plaintiff's bill is to obtain possession of jurisdiction over a territory about four and a half miles wide, north and south, by about twenty miles long, east and west. This territory constitutes, we say, the northern border of Rhode Island, and is included in the charter granted to Rhode Island, by the crown of England.

On the contrary, it is contended by Massachusetts, that this territory constitutes her southern border and is included in her charter. The object of the controversy, therefore, is to settle the dividing line between two conterminous states, so far as it involves the rights of the parties to jurisdiction. The right to the soil is not in dispute.

Massachusetts has demurred to the whole of the plaintiff's bill; and the question is, whether, taking the case as it is presented by that bill, Rhode Island is entitled to relief. The first and most obvious inquiry, therefore, is, what are the facts set forth in the bill?

The leading and prominent facts are, 1st. The charters of the crown to the two states of Massachusetts and Rhode Island. By the Massachusetts charter, her southern line or boundary, is declared to be "within the space of three English myles on the south parte of the saide river called Charles river, or of any, or every, parte thereof." The northern boundary, or line, of Rhode Island, is declared by her charter to be, "And from thence by a straight line, drawn due north until it meets the south line of the Massachusetts colony; and on the north, or northerly, by the aforesaid south, or southerly, line of Massachusetts."

By the Massachusetts charter, dated in 1629, the said Henry Rosewell et al, are created "A corporation by the name of the Governor and Company of Massachusetts Bay;" "which said officers shall apply themselves to take care for the best disposing and ordering of the general business and affairs of, for, and concerning the said lands and premises hereby mentioned to be granted, and the plantation thereof, and the government of the people thereof." It then provides for four meetings of the general Court, each year, and authorizes them "to make laws and ordinances for the good and welfare of said company, and

*250 for * the government and ordering of the said lands and plantations, and the people inhabiting, and to inhabit, the same."

The same emphatic language is used in the Rhode Island charter. It creates the freemen of Rhode Island a corporation with perpetual succession; prescribes the times and mode of choosing the Governor and members of the legislative assembly; and authorizes the Assembly, "from time to time to make, ordain, &c., such laws, &c., for the government of the lands hereinafter granted, and for the government of the people who now inhabit, or may hereafter inhabit, the same." "To establish Courts to settle all matters within said colony."

Both charters, in their grants of legislative, executive, and judicial powers, closely and cautiously limit the exercise of those powers "to the said lands hereby granted." The powers themselves differ very materially as to their extent. The powers granted to Massachusetts, and none other, by the very terms of the Massachusetts charter are to be exercised within "the said lands," described in the Massachusetts charter, and by officers chosen by the freemen of Massachusetts. The powers granted to Rhode Island and none other, by the very terms of the Rhode Island charter, are to be exercised within "the said lands hereinafter mentioned," and by officers chosen by the freemen of Rhode Island. "And further, our will and pleasure is, that in all matters of public controversy which may fall out between our colony of Providence Plantations, and the rest of our colonies in New England, it shall and may be lawful to and for our said colony of Providence Plantations to make their appeals therein to us, our heirs and successors, for the redress of their grievances, in England."

By these charters the following important facts are established,

1st. That the first settlers of Massachusetts, and Rhode Island, were not independent individuals, tribes, or communities, who took possession by conquest, or otherwise, for themselves, over their respective territories, claiming and acquiring an original and inherent power of legislation therein; a power which they could consequently transfer to each other or to any third person or community.

2d. They took possession as subjects of the crown of England, of a
*251 portion of a country claimed to have been discovered by * England; they took possession for, and under, the crown of England: that all the powers of legislation which they ever claimed, or exercised, was by express grants from the crown; that by accepting these grants they acknowledged the power of legislation to be in the crown; that to Massachusetts was granted the power to legislate over lands as far south as "three miles south of Charles river, and of any and every part thereof;" that to Rhode Island was granted the power to legislate as far north as the southernmost line of Massachusetts; that the power to legislate north of that line, was delegated by the Massachusetts charter to Massachusetts officers, who were to be chosen by Massachusetts freemen in a certain mode; that the power to legislate south of that line was delegated by the Rhode Island charter, to Rhode Island officers to be chosen by Rhode Island freemen in a different mode; that both these powers were entire powers, to be exercised by each in the mode, by the officers chosen, and at the time specified in the respective charters; that Massachusetts must exercise the powers over the lands, and all the lands specified in her charter; that Rhode Island was subject to the same rule; that, consequently, it was not competent for either Massachusetts or Rhode Island, by any agreement (not ratified by the crown) to vary those powers, or to enlarge or lessen the territory over which they were to be exercised; that in this respect they were like all other corporations, and like most other colonial governments; that the right to legislate was in the

crown, the temporary exercise of it, alone, was in the colonies; and this exercise might be terminated at the pleasure of the crown.

There was not only no authority in the charters of either of these colonies to delegate any portion of their derivative powers; but there is an implied if not a positive prohibition against it, for in "all matters of public controversy which may fall out between our colony of Providence Plantations, and the rest of our colonies in New England, it shall and may be lawful to make their appeal to us, in England."

No subject can be considered of "public controversy" with more propriety than a dispute between two colonies in regard to their boundaries. Indeed it is impossible to reconcile the studied and cautious limitation of the powers *252 granted, even down * to those almost of a police nature, with the supposition of a power to cede any portion of their territories. There was a double incapacity. Rhode Island was incompetent to sell, and Massachusetts incompetent to purchase territory, the jurisdiction over which was exclusively in the crown. It would be a startling proposition that Jamaica could cede to Bermuda the jurisdiction over a part of her island. Even the compromise of a disputed line, would derive all its validity from the express or implied ratification of the crown.

From these charters, then, we arm ourselves with the following facts to start with:

1st. That Massachusetts and Rhode Island, from the date of their charters, 1628 and 1663, down to 1775, were not sovereign independent states, but political corporations, possessed, as trustees for the people, and by grant from the crown of England, of jurisdiction over certain specified limits.

2d. That neither of the charters contained any authority to delegate this jurisdiction, or any portion of it, nor any authority to acquire jurisdiction over any other lands than those specified in their charters.

3d. That as these charters limit the south line of Massachusetts to "three miles south of Charles river, and of any and every part thereof," and grant to Rhode Island jurisdiction up to that line; that Rhode Island is still entitled to that line, unless it appears upon the face of this bill, that it has been expressly ceded to Massachusetts, by the crown of England, or by Rhode Island, with the express or implied assent of the crown.

With this preparation we will approach the years 1710 and 1718, when the agreements, upon which Massachusetts relies, were made. Those agreements are copied into the bill, and were made by commissioners with full authority from the two states. After they were concluded by the commissioners, and the line run in 1718, to which Massachusetts has ever since claimed, they were accepted by the legislatures of both states; but never formally ratified. All the allegations in the bill, in relation to those agreements, whether true or untrue, in point of fact, must be taken for truth, for all the purposes of this trial; because they are admitted by the demurrer. One material allegation is, *253 "that a short time previous to the year 1709, the inhabitants of said * colony of Rhode Island, entered upon certain parts of said lands adjoining the northern boundary of said colony, and made improvements thereon, and grants thereof." The bill then states the existence of disputes between the inhabitants of the two states, in relation to the boundary line; and that, in consequence of said disputes between said inhabitants, the two colonial governments appointed commissioners to ascertain and settle the northern boundary line of said colony of Rhode Island; that these commissioners met at Roxbury, on the 19th January, 1711.

"That the Massachusetts commissioners then and there represented to the

Rhode Island commissioners, that Woodward and Saffrey, skilful and approved artists, in 1642, had ascertained the point or place three English miles south of the river called Charles river, or of any and every part thereof, and had there set up a stake; and that the said Rhode Island commissioners, relying on said representations, and verily believing the said point or place to have been correctly ascertained, and the said place, where said stake was alleged to have been set up as aforesaid, to be three English miles, and no more, south of said Charles river, signed and sealed a certain writing, called an agreement in the words following."

The agreement itself sets forth the authority of the two governments conferred upon the commissioners, and a statement of the inducements to settle the dispute in an amicable manner, and then proceeds to state, "That they have mutually agreed, that the stake set up by Woodward and Saffrey, skilful approved artists, in 1642, and since often renewed, in lat. 41° 55′, being three English miles distant southward from the southernmost part of the river, called Charles river, agreeable to the letters patent for the Massachusetts province, be accompted and allowed on both sides, the commencement of the line between Massachusetts and Rhode Island, and to be continued between the governments in such manner as that, after it has proceeded between the two governments, it may pass over Connecticut river, at or near Bissel's house, as is decyphered in the plan and tract of the line by Woodward and Saffrey, now shown forth to us, and is remaining upon record in the Massachusetts government."

The bill then states that disputes still continued to exist between the
*254 inhabitants; that the boundary line still remained unsettled, * as said pretended agreement was never in any manner ratified or confirmed by said colony of Rhode Island; that new commissioners were appointed in 1717, with full powers to settle all disputes; that these commissioners met at Rehoboth, in October, 1718; that the Massachusetts commissioners made the same representations in regard to the Woodward and Saffrey stations, being but three English miles south of Charles river, as were made by the former commissioners from Massachusetts; that the Rhode Island commissioners, fully confiding in these representations, signed the second agreement, commonly known as the Rehoboth agreement.

The agreement then states, "That the stake set up by Woodward and Saffrey, in 1642, upon Wrentham Plain, be the station or commencement to begin the line which shall divide between the two governments aforesaid; from which said stake, the line shall run so as it may, at Connecticut river, be two and a half miles southward of a due west line, allowing the variation of the compass to be nine degrees: which said line shall forever remain," &c.

The bill repeatedly states that the commissioners did not go upon the ground, nor cause the distance from Charles river to be measured, so as to ascertain whether the Woodward and Saffrey station was but three miles from the river or not. It also states that neither of these agreements were ever ratified by the legislatures of either of the colonies; that both said agreements, and all the proceedings of the Rhode Island legislature thereon, were founded on the belief that the Woodward and Saffrey station had been ascertained, by competent and skilful surveyors, to be but three miles from Charles river, and no more; that such mistaken belief continued to exist until 1749, when commissioners were again appointed by both colonies. The act appointing the Rhode Island commissioners is set out in the bill. Its preamble is as follows: "Whereas, the northern line of this colony has never been settled according to the royal charter: and whereas, divers persons have made application to this assembly,

and have set forth their just right to be under the jurisdiction of this government, as dwelling within the bounds thereof; and that the province of
*255 * Massachusetts Bay have and do unjustly exercise jurisdiction over them: In order, therefore," &c.

The Rhode Island commissioners met at Wrentham, after giving the Massachusetts commissioners notice of the time and place; and after waiting for them two days, they commenced measuring the distance from the most southerly part of Charles river to the Woodward and Saffrey station, the starting point of the line agreed upon by the commissioners in 1710 and 1718, and instead of three miles from Charles river, as had been stated by the Massachusetts commissioners, and as was laid down upon the Woodward and Saffrey map, they found it to be over seven miles. These commissioners measured three miles due south from the most southerly part of Charles river, and from the point extended a line due west until it reached the Connecticut line. Upon this east and west line, only three miles south of Charles river, they erected various monuments. The Massachusetts commissioners refused any participation in the measurement of the distance of three miles south of Charles river, but adhered to the line established four miles farther south, by the agreements of 1710 and 1718.

Three lines, then, have been run between these two states. The first in 1720, by agreement of the commissioners of both parties, beginning at the Woodward and Saffrey station, "being three miles south of Charles river, agreeable to the letters patent for the Massachusetts province, and to be continued between the two governments in such manner that it may pass over Connecticut river at or near Bissel's house."

The second line was by the agreement of the commissioners of the two states, in 1718, and starting from the same point, the Woodward and Saffrey station, "from which said stake the dividing line shall run, so as it may, at Connecticut river, be two miles and a half to the southward of a due west line." These two agreements differ materially in the course of the line, the first terminating at the west end, several miles farther south than the second.

The third line was run by the Rhode Island commissioners alone, (the Massachusetts commissioners having declined any agency in it,) in 1750, and not only its termination at the west end, but its commencement at the east
*256 end, was between four * and five miles farther north than the two former lines. It is alleged in the bill, that Rhode Island first discovered that the Woodward and Saffrey station was over seven miles south of Charles river, in 1749 or 1750, when this last line was run.

It is also alleged, in the bill, that Massachusetts took possession as far south as the line established in 1719, immediately after that period; and has been in the possession of the territory between that and the line run by the Rhode Island commissioners, in 1750, ever since 1719.

It is also stated, as a fact, "that the place from which said line was run, (the line of 1719,) was and is more than seven miles south of the river called Charles river, and of any and every part thereof."

Upon the whole facts, as stated in the bill, and admitted by the demurrer, the defendant contends that she is entitled to continue her possession of the disputed territory; 1st. Because jurisdiction over that territory, was ceded to her, by force of the agreements of 1710 and 1718. 2d. Because, having been in the actual possession of that jurisdiction, as the bill itself states, from 1719, down to the filing [of] the bill in 1832, she has gained a title to jurisdiction, by possession and prescription.

All the material and important facts in relation to the first point: the legal effect of the agreements, standing by themselves, have been stated; except the

allegation distinctly made, that these agreements were never ratified by the crown We will now consider briefly the question, do these agreements, by themselves, infer any right to jurisdiction, over the territory in dispute?

A recapitulation of the facts bearing upon the validity of these agreements, may aid us in estimating the force of the opposite argument.

1. Massachusetts admits, that her chartered line on the south, is an east and west line, three miles south of Charles river; and that the north line of Rhode Island, by her charter, is the south line of Massachusetts. Consequently, she admits, that, by the express terms of the two charters, the territory in dispute belonged to Rhode Island, anterior to 1710, being all that territory lying more than three miles south of Charles river; and the south line of it, as claimed,
*257 and occupied by Massachusetts, * "more than seven miles from Charles river, and from any and every part thereof."

2. She admits that the two agreements of 1710, and 1718, establishing the Woodward and Saffrey station, were entered into under the representation by the Massachusetts commissioners, that the station had been fixed and established by skilful surveyors, and was but three miles from Charles river; that the map of these artists was produced by the Massachusetts commissioners, in confirmation of this representation; and that the Rhode Island commissioners, confiding in this false representation, entered into these agreements, under the full belief that said station was but three miles from Charles river, and no more. Massachusetts now admits that said station, and said line run from it, were more than seven miles from Charles river, and from any and every part thereof.

3. She admits, that these agreements were never ratified by the crown of England; that the mistake was not discovered by Rhode Island, until 1749, or 1750, when her commissioners ran a line three miles south of Charles river, its course due east and west; and that Rhode Island has claimed to that line ever since.

These are the facts admitted by the pleadings, upon which the validity and binding effect of the agreements depend.

In the argument of that question, it has not been pretended, that such agreements between two individuals, would be binding either in law or in justice. The misrepresentation of one party, and the mistake of the other, would render them a mere nullity.

The only ground upon which it is attempted to support them is, that they amount to a treaty between two sovereign states; and that it is a principle of the laws of nations, that all treaties are binding, whatever may have been the mistake of either party.

We do not admit the existence of any such rule among nations. A practical difficulty in annulling treaties between sovereign states, founded on mistake, may arise from the absence of any common arbiter between them. But suppose a common arbiter, by the agreement of parties, fully authorized to settle any question of boundary between two nations of sovereign and independent power,
*258 and one of them should rely upon a treaty, * which it admitted was founded in a mistake of the other party, caused by its own misrepresentations; is there any tribunal in the civilized world that would sanction such a treaty? This Court is a tribunal established by the Constitution, to decide all such questions between the states, that have become parties to that Constitution. Was it the intention and design of the Constitution, that this Court should decide without regard to any fixed principles of law or justice? If a treaty between two states, founded in admitted mistake, is binding, why not a treaty founded in fraud? If fraud or mistake will not vitiate a treaty between states, will it vitiate any other contract? Without entering into this subject, we merely express one [our] dissent

to the whole doctrine. Our main answer to it is, that in 1710, and 1718, Massachusetts and Rhode Island were not sovereign and independent states, but colonial governments, with powers of an extremely limited character. They were trustees of legislative powers, under a grant from another nation, made for the benefit of the people.

No agreement in relation to their jurisdiction, even though made fairly and understandingly, could bind the crown, until ratified by the crown. How then could an agreement made under an admitted mistake, be allowed a more binding efficacy, than an agreement made understandingly? Besides, it is expressly averred in the bill, that neither of these agreements were even ratified by the crown; and the demurrer admits that fact.

We have not merely the admission of Massachusetts, that these agreements were founded in mistake, but the mistake is apparent on the face of the agreements themselves. The agreement of 1710, states, expressly, that they were to begin the line, from the Woodward and Saffrey station, "being three English miles distant from the southernmost part of Charles river, agreeable to the letters patent." There was never any dispute between the parties, but that the line was to be three miles south of the river, and no more. That was the agreed basis of the contract. The only dispute was, what course that line should run; Rhode Island contending for a due west course, and Massachusetts for a course south of west.

The question, therefore resolves itself into this; can an agreement
*259 founded in an admitted mistake, or a mistake apparent * upon the face of the instrument, be supported either in law or equity? For a much stronger reason, can such an agreement between parties, having no power to contract in relation to the subject-matter, be supported?

An omission in an agreement by mistake, stands on the same ground as an omission by fraud. Ramsbottom *v.* Gosden, 1 Ves. and Beam. 168; 3 Atk. 338. 6 Ves. 344, note C.

"The general rule is, that an act done, or contract made under a mistake, or ignorance of a material fact, is voidable and relievable in equity." Story's Equity Jurisprudence, 155. 9 Ves. Jun., 275. Bingham *v.* Bingham, 1 Ves. Sen. 126. Gee *v.* Spencer, 1 Vern. 32.

Cocking *v.* Pratt, 1 Ves. Sen., 400, is a strong case, resembling the present, in many of its features. Honor *v.* Honor, 1 P. Williams, 123, is also applicable to the present case. Articles, and a settlement in pursuance thereof, were both made before marriage, but the settlement varied from the uses of the articles. Decreed to set the settlement aside. Chancellor: "It is a plain mistake in varying the settlement from the articles, and this appearing upon the face of the papers, and the plain reason of the thing, length of time is immaterial." In the case before the Court, the mistake is admitted. It also appears upon the face of the agreements. The case of Leonard *v.* Leonard, 2 Ball and Beatty's Reports, was a case of compromise. Lord Manners said that "the plaintiff acted under an evident mistake. The defendant cannot be permitted to hold an estate which manifestly belongs to the plaintiff; and which the defendant has obtained either by the mistake or misrepresentation of the agent."

We shall dismiss this part of the case, and very briefly consider the question, whether length of time affords any defence to Massachusetts. We have various answers to the argument from time. In the first place, time is no objection to relief, where the mistake is admitted; if the case arises between the original parties to the contract; and if the plaintiff has not misled the defendant, by concealing the mistake an undue time, after it was discovered. In the present case, it is admitted that Rhode Island disclosed the mistake as soon as it was discovered.

It comes within the principle of Honor *v.* Honor, 1 P. Williams,
*260 * 123; the mistake "being apparent on the face of the papers, length of time is immaterial."

In the second place, length of time, though a bar in some cases to a claim for property, does not affect a claim for jurisdiction.

These are questions, however, more proper to be discussed, when the general merits of the case come before the Court, upon a general denial of the plaintiff's bill. The principal question upon these pleadings is, whether length of time can be taken advantage of, upon a demurrer? As this is a mere question of authority, we shall content ourselves with a reference to such cases as bear most strongly upon the point.

Both in law and in equity, time has a twofold operation; often confounded by unskilful persons; but possessing, in reality, characters wholly distinct, and wholly unlike each other. In many cases, it operates as a bar to the plaintiff's remedy. In a class of cases more numerous, it operates as a witness in favour of the defendant. In this last mode of its operation, it has nothing to do with the remedy, but it is applied to the merits of the plaintiff's claim.

In its first mode of operation, it is called a statute of limitations; and unless the case is embraced by certain enumerated exceptions, such as infancy, coverture and other disabilities, which must be specially stated in answer to the special plea of the defendant, it is an unyielding and peremptory bar to the plaintiff's action. Still, the demand exists for certain purposes, although the remedy is destroyed. It still would form a sufficient consideration for a new promise.

But, in its second mode of operation, it is not necessary to plead the lapse of time relied upon. It is introduced as a witness in the cause before the jury; and, like all other witnesses, its testimony may be contradicted or qualified in a thousand ways, because it swears to matters of fact alone. Thus, in cases in which twenty years operate as presumptive evidence of a grant; the opposite party may disprove the existence of the grant, or remove the presumption by any means in his power, and the jury are to judge of the weight of conflicting testimony.

But a plea of the statute of limitations, if admitted by the plaintiff,
*261 that is, if he admits that the time has elapsed, and that * his case does not come within one of the specified exceptions, is matter of mere law, to be decided by the Court. A statute of limitations prescribes a definite time, six years, or twenty years, beyond which no action can be brought. It operates alike in all cases, and if the lapse of time is admitted, is fatal to the plaintiff's case. No circumstances can ward off its unerring blow. But when time operates as evidence addressed to a jury, the plaintiff may safely admit the lapse of twenty, thirty, or fifty years, and destroy its effect in a thousand different modes.

In Courts of Law, a statute of limitations must be specially pleaded. Even if it appears upon the face of the declaration, that more than the prescribed time has elapsed, still the defendant must present it anew, in a special plea. But in those cases, as to which Courts of Equity have concurrent jurisdiction with Courts of Law, and in which a statute of limitations applies; if it appear upon the face of the bill that the prescribed time has elapsed, and the disabilities mentioned in the statute, are not stated in the bill in avoidance of the bar, the defendant may demur to the bill. This difference in the mode of pleading the statute in the two Courts is simply this, that in a Court of Law the statute must be pleaded by the defendant, and the disabilities, if any, introduced in the plaintiff's replication. But in a Court of Equity, if the lapse of time is apparent on the face of the bill, the disabilities in avoidance must also be stated, otherwise the defendant may demur to the whole bill.

In the case now under consideration, it is not pretended that time operates

as a bar. If the case had been on the law side of the Court, there is no statute of limitations that could be pleaded in bar to the remedy. There is no provision in any statute in England, or this country, applicable to the subject-matter of this suit, jurisdiction, nor to the parties, sovereign states. Time, therefore, can only come to the aid of the defendant as a witness, to prove possession on the part of the defendant, and acquiescence on the part of the plaintiff. Like all other witnesses, his testimony must be offered to the jury upon an issue of fact, and not to the Court upon an issue of law.

In the case of Deloraine *v.* Brown, 3 Brown's Ch. Cases, 646, (London, edition of 1819, by Eden,) is a note of Lord Thurlow's * opinion, preserved by Redesdale, which places this question in its true light.

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"The party who demurs," said his lordship, "admits every thing that is well pleaded, in manner and form as pleaded; and a demurrer ought, therefore, in a Court of law, to bring before the Court a question of mere law; and in a Court of Equity a question of law or equity merely. The demurrer, therefore, must be taken to admit the whole case of fraud made by the bill, and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that, from long acquiescence, it should be presumed that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction. This must be an inference of fact, and not an inference of law, and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer, of an inference of fact, upon matter upon which a jury in a Court of Law would collect matter of fact to decide their verdict, or a Court would proceed in the same manner in equity. What limitation of time will bar a suit, where there is no positive limitation or under what circumstances the lapse of time ought to have that effect, must depend upon the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore cannot be made on demurrer. But where the defence is not a presumption, from long acquiescence, but a positive limitation of time, which the Court, by analogy to the statute of limitation, adopts, it may clearly be taken advantage of by demurrer."

In the case of Hovenden *v.* Lord Annesly, 2 Schoale and Lefroy, 629, it was decided, that in cases of a positive limitation of time as a bar to the remedy, a demurrer to the bill would be sustained. That case was decided by Lord Redesdale, in 1806. In the edition of Lord Redesdale's Treatise upon Equity Pleading, by Jeremy, the edition of 1836, (revised by Redesdale himself,) page 212, the distinction taken in the above note and opinion of Thurlow, is maintained.

Mr. Justice Story, in his very able Treatise upon Equity Pleading, p. 378, states the doctrine with great clearness. "The same principle," he says, "will apply to a bill which states a * case within the statute of limitations at law, and upon which Courts of Equity follow the analogy of the law, for, under such circumstances, Courts of Equity hold that the objection may be taken as a defence by demurrer."

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In one of the latest treatises upon Chancery Practice, by Daniell, (published in 1838, London edition,) pages 43 and 44, all the decisions upon this subject are cited, and they show conclusively that a demurrer can be sustained in cases analogous to the statute of limitations. But he says,

"It is to be remarked here, that all the above cases were decided upon the ground of their coming within the statute of limitations, or the rules of the Court which have been adopted in analogy to the statute, and that therefore there was a positive limitation of time upon which the Court could proceed. Where, however, there is no such positive limitation, the question whether the Court will in-

terfere or not, depends upon whether, from the facts of the case, the Court will infer acquiescence, or confirmation, or release. Such inference is an inference of fact and not of law, and cannot be raised on demurrer." He cites Cuthbert *v.* Creasy, Mad. and Geld's Rep. 189, as a recent decision of the English Chancery upon this very point.

Upon the mere technical law of pleading, therefore, we feel great confidence that no advantage of time can be taken in the present case, by demurrer.

But, besides the mere technical objection, there are reasons lying close to the merits of the case, which show conclusively that extreme injustice would be done to Rhode Island, to allow the lapse of time to be taken advantage of under a demurrer. We have stated in our bill that Massachusetts took possession of the territory in dispute in 1719, and has continued in possession ever since. But we have also stated various matters in avoidance of this possession.

In page 43 of the printed case it is stated "that the said province of Massachusetts, on or about the 14th of May, 1719, wrongfully took possession of all that tract, &c." "And has since continued, wrongfully, to exercise jurisdiction over the same."

The bill then proceeds to state that the line established by the agree-
*264 ment of 1719, was never confirmed by Rhode Island, * "but that, on the contrary, the claim of said colony, uniformly was, that the true dividing line on the north part of said colony, was a line drawn three English miles, and no more, south of the south part of said Charles river, or of any or every part thereof, as defined and granted by the letters patent aforesaid; and that the claim of Massachusetts to any other or different line was never acquiesced in, or consented to, by said colony of Rhode Island; and that the said claim of the said colony was publicly and frequently urged and maintained by said colony, and by the freemen and inhabitants thereof."

Here are clear and distinct allegations of facts. The demurrer admits the truth of them. It admits that Rhode Island never acquiesced in the possession or claim of Massachusetts, but always maintained her claim for the charter line as now contended for.

This demurrer admits the facts of non-acquiescence. It admits the truth of all evidence which the plaintiff by any possibility can offer, under that general allegation. The very question as to time in this case is, has Rhode Island acquiesced in the possession of Massachusetts? In her bill she says she has not; and she has a right to offer any and all evidence which tends to prove that fact. But the demurrer excludes that evidence by admitting the fact itself. It will not answer to admit the fact in pleading, and deny it in the argument. It must be denied in pleading, so that Rhode Island may offer her evidence, or it cannot be denied at all. Can it then be gravely contended by the learned counsel of the very lofty and imposing state of Massachusetts, that agreements entered into under a clear and admitted mistake, caused by her own misrepresentations, can stand for one moment in any Court, in any civilized nation in the world? Can it be contended, that any length of possession under such agreements, admitted to have been wrongfully taken in the first instance, wrongfully continued, and never acquiesced in by Rhode Island, can confer upon Massachusetts any title? Our difficulty has been to find, in the whole range of the case, a spot of debatable ground.

Mr. Webster, in support of the demurrer.

The bill of Rhode Island asks the Court to disturb a boundary
*265 * between that state and Massachusetts, which has been settled for more than two hundred years. This is a question of great magnitude; and the

matter for the decision of the Court is, whether a case has been made out in the bill on which Massachusetts may resist the claim thus presented.

The charter of Massachusetts originated in a grant by the council established at Plymouth, on the 19th of March, 1628, to Sir Henry Rosewell and others; by which the soil and jurisdiction of the territory, now belonging to the commonwealth of Massachusetts, was granted to a southern boundary, to run three miles south of Charles river. In 1663, the province of Rhode Island was granted by King Charles II., and the grant was limited to, and by the southern boundary of the colony of Massachusetts. As to the exact location of this boundary, difficulties arose, and commissioners were appointed by Rhode Island and Massachusetts; and in 1719 agreements were made by the commissioners of both parties.

What is the ground on which these agreements are to be set aside? It is said to be that they were founded in mistake; and that by them Massachusetts has gained, and Rhode Island has lost four miles of territory. This is the whole ground. No fraud is charged, none is alleged. No assertion is made in the bill that advantage was taken by Massachusetts in the adjustment; or that the Commissioners of Rhode Island had not knowledge of the subject confided to them: and if they had been ignorant, it would not avail. They had full right and full opportunity to make all necessary examinations.

It is said, that under the mistake, the line was placed seven miles from Charles river, instead of three miles. Rhode Island discovered the mistake in 1749, and that the proceedings set forth in the bill, show that Rhode Island has not acquiesced in the line then established; the object of this application to the Court is to obtain relief from the mistake discovered in 1749.

The question is, whether this Court can interfere after so long a period; whether time alone will not prevent the disturbance of an adjustment of such long standing, and in reference to which no adverse movement has been made for nearly one hundred years; and as to which nothing has been done by
*266 Rhode * Island, other than expressions of dissatisfaction. If it were a recent transaction, no adjudged cases are known to sustain the application: and no principles of public law will sanction the interference of the Court. If it was an affair of yesterday, the Court would not act upon it.

Several things were to be ascertained by the commissioners. The course of Charles river and its branches, and then a line running three miles south of the river. This was the established charter boundary of Massachusetts, to which the northern line of Rhode Island was limited by her charter, granted many years after that of Massachusetts. After all the investigation the commissioners thought necessary, they adopted the Woodward and Saffrey station, as the point which was to determine the boundary line; a point which had been fixed twenty years before the existence of Rhode Island. No misrepresentations are charged to the commissioners of Massachusetts; no interference with the inquiries which the Rhode Island commissioners might be desirous of making; and the determination of the question was made after every opportunity for examination. If a mistake was made, which is not admitted, can relief from it be now obtained, where no fraud is imputed.

The cases in the books sustain the views of the counsel for the state of Massachusetts. If better knowledge exist in one party to an agreement than in the other, the agreement will not be disturbed. 9 Ves. 273. If parties are dealing, and both have equal opportunities of knowledge, the Court will not interfere. In this case, there were no confidential relations between the parties. They were dealing adversely. 1 Ves. jr., 408.

If men have agreed to a boundary between them, and it may be afterwards

disturbed on the ground of mistake, the consequences would be disastrous, and fatal to the tranquil ownership of estates. Boundaries must be settled for the assurance of cultivation. The husbandman would refuse to improve his land, unless he was at rest on the subject of the lines and corners of his property. If these principles regulate the concerns of individuals, how much more necessary are they in the relations between coterminous states. This is supported by the writers on international law. Vattell says, the agreements between nations,
*267 however mistaken, are to stand. If this is not so, how shall such * disputes be at any time adjusted. The books, and all history, are full of these principles.

Mr. Webster referred to the controversy between William Penn and Lord Baltimore, in support of these principles; the settlement of the disputes as to boundaries between the states of Kentucky and Tennessee; and to other cases. Will any one say these adjustments, and the lines established under them, can now be disturbed on the ground of mistake? It is said the bill of Rhode Island charges the mistake, and the demurrer admits it; and therefore, the whole case of the complainants is admitted. The question to be decided by the Court is not whether the mistake is admitted, but what is the effect of the mistake. The mistake is immaterial, and this is submitted to the Court. If the mistake could not entitle the complainant to relief, its admission would not do so.

If there had been a fraud; if the commissioners of Rhode Island had been deceived, there is no ground for relief. It is too late, at this distant period, to inquire into such a transaction.

This brings the Court to the inquiry, what is the effect of lapse of time? But it is said the demurrer will not permit the party to avail himself of lapse of time. In order to do this, an answer must be put in. But the lapse of time is on the face of the complainant's bill; and when this is so, it will avail the party demurring.

This is a question of pleading. The Court has adopted the rules and principles of the Court of Chancery in England; and they will regard the decisions of the English Courts of Chancery on this question. It has been settled in these Courts for a half a century. The case of Foster v. Hodgson, 19 Ves. 180–184, determines this point: cited also, 1 Vesey and Beame, 535, 536. 7 Paige, 195. 6 Paige, 590. 2 Schoales and Lefroy, 630. Story's Equity Pleading, 378. 389.

The defendant, the state of Massachusetts, is right, therefore, in the form of pleading; and lapse of time, possession, and acquiescence, are a complete bar against fraud. The bill states that the mistake was discovered in 1749, and no proceedings took place in this Court until 1835—eighty-six years afterwards!

There are two modes in which lapse of time may be taken advantage
*268 of in Courts of Equity. The first, where the law * expressly applies to the case. A Court of Equity then adopts the same rule. 2 Jacobs and Walker, 191. 2 Story's Equity Jurisprudence, 735. Second, wherever there has been laches, the statute of limitations will be applied by Courts of Chancery. Story, 735, 736. In this case, both rules apply. There has been most abundant laches. Why did not Rhode Island apply to the Privy Council—to the Continental Congress—to this Court, established in 1789? This is acquiescence; no matter what the complainants say, it is acquiescence. Such a course of acquiescence cures fraud, if any fraud had existed. 2 Story's Equity, 739, note; cited also, Story's Equity Pleadings, 379. 9 Peters, 405. Bourn *v.* Chiles, 10 Peters, 177. 1 Story's Equity, 139, 189. 502. 2 Sch. and Lef. 636. The complainants assert that lapse of time is only evidence against their title, but the demurrer of the defendant takes away the operation of the evidence. This cannot be, or there would be no demurrer for lapse of time on the face of the bill. But Courts of Equity adopt a higher prin-

ciple. They will not assist a plaintiff to maintain a stale claim. They will save a party from the trouble of resisting such demands. It is manifest, then, that if there was mistake; if there was fraud; no relief will be granted after such a lapse of time. There is another and an important point for the consideration of the Court in this case.

The Constitution gives the Supreme Court a right to decide controversies between the states of the Union. This is a case in which two states having agreed to an actual and defined boundary, nearly one hundred years ago, come before the Court, and the Court is asked to disturb this boundary established before the states came into the confederacy—to change the limits of the territory each possessed when she entered into it—can this Court interfere in such a matter? Each of the states, took her position in the Union holding the territory now held, with the actual boundaries to their territories well known and long established. Independence was declared by the states with these limits. The treaty of peace in 1783 acknowledged the states as they then existed. No disturbance can be made of the territories of each state after this mutual recognition, and after this acknowledgment by the nation, to which, before the Declaration of Independence and the treaty of peace, they were
*269 subject. No * tribunal which has its existence under a constitution of government formed after these relations existed, has power to interfere between them in such a question.

Mr. Chief Justice TANEY delivered the opinion of the Court.

The attention of the Court has on several occasions been drawn to this case by the important questions which have arisen in different stages of the proceedings. At the last term, it came before us upon a plea in bar to the complainant's bill, which, upon the motion of the complainant had been set down for argument.

This part of the case is reported in 14 Peters, 210, where the allegations contained in the bill are so fully set out that it is unnecessary to repeat them here. The Court having overruled the plea for the reasons stated in the report of the case, the defendant has since demurred; and in this state of the pleadings the question is directly presented, whether the case stated by Rhode Island in her bill, admitting it to be true as there stated, entitles her to relief.

The character of the case, and of the parties, has made it the duty of the Court to examine very carefully the different questions which from time to time have arisen in these proceedings. And if those which are brought up by the demurrer were new to the Court, or if the judgment now to be pronounced would seriously influence the ultimate decision; we should deem it proper to hold the subject under advisement, until the next term, for the purpose of giving to it a more deliberate examination. But although the questions now before the Court did not arise upon the plea, and of course were not then decided, yet much of the argument on that occasion turned upon principles which are involved in the case as it now stands. The facts stated in the bill were brought before us, and the grounds upon which the complainant claimed relief were necessarily discussed in the argument at the bar, and the attention of the Court strongly drawn to the subject. The whole case, as presented by the bill and demurrer has been again fully and ably argued, at the present term; and as the Court has made up its opinion, and are satisfied that the delay of our judgment to the next term would not enable us to obtain more or better light upon the subject, it would be useless to postpone the decision.

*270 * The demurrer admits the truth of the facts alleged in the bill, and it is sufficient for the purposes of this opinion to state in a few words the material allegations contained in it.

1st. It alleges that the true boundary line between Massachusets and Rhode Island, by virtue of their charters from the English crown, is a line run east and west three miles south of Charles river, or any or every part thereof; and sets out the charters which support, in this respect, the averments in the bill.

2d. That Massachusetts holds possession to a line seven miles south of Charles river, which does not run east and west, but runs south of a west course; and that the territory between this line and the true one above mentioned, belongs to Rhode Island, and, that the defendant unjustly withholds it from her.

3d. That Massachusetts obtained possession of this territory under certain agreements and proceedings of commissioners appointed by the two colonies, which are set out at large in the bill; and the complainant avers that the commissioners on the part of Rhode Island, agreed to this line under the mistaken belief that it was only three miles south of Charles river; and that they were led into this mistake by the representations made to them by the commissioners on the part of Massachusetts, upon whose statement they relied.

4th. That this agreement of the commissioners was never ratified by either of the colonies: and the bill sets out the various proceedings of the commissioners and legislatures of the two colonies, which if not sufficient to establish the correctness of the averment, are yet not incompatible with it.

5th. The bill further states that the mistake was not discovered by Rhode Island until 1740, when she soon afterwards took measures to correct it; that she never acquiesced in the possession of Massachusetts, after the mistake was discovered, but has ever since continually resisted it; and never admitted any line as the true boundary between them, but the one called for by the charters. Various proceedings are set out, and facts stated in the bill, to show that the complainant never acquiesced; and to account for the delay in prosecuting her claim. Whether they are sufficient or not for that purpose, is not now in question. They are certainly consistent with the averment, and tend to support it.

*271 * The case then, made by the bill, and to be now taken as true, is substantially this: The charter boundary between these colonies was three miles south of Charles river; and the parties intending to mark a line in that place, marked it by mistake, four miles further south, encroaching so much on the territory of Rhode Island; and the complainant was led into this mistake by confiding in the representations of the commissioners of the defendant. And as soon as the error was discovered, she made claim to the true line and has ever since contended for it. We speak of the case as it appears upon the pleadings. It may prove to be a very different one, hereafter, when the evidence on both sides is produced. But taking it as it now stands, if it were a dispute between two individuals, in relation to one of the ordinary subjects of private contract; and there had been no laches to deprive the party of his title to relief; would a Court of Equity compel him to abide by a contract entered into under such circumstances?

It is one of the most familiar duties of the Chancery Court to relieve against mistake, especially when it has been produced by the representations of the adverse party. In this case, the fact mistaken was the very foundation of the agreement. There was no intention on either side to transfer territory, nor any

consideration given by the one to the other to obtain it. Nor was there any dispute arising out of conflicting grants of the crown, or upon the construction of their charters, which they proposed to settle by compromise. Each party agreed that the boundary was three miles south of Charles river; and the only object was to ascertain and mark that point: and upon the case, as it comes before us, the complainant avers, and the defendant admits that the place marked, was seven miles south of the river, instead of three, and was fixed on by mistake; and that the commissioners of Rhode Island were led into the error, by confiding in the representations of the Massachusetts commissioners. Now, if this mistake had been discovered a few days after the agreements were made, and Rhode Island had immediately gone before a tribunal, having competent jurisdiction, upon principles of equity, to relieve against a mistake committed by such parties, can there be any doubt that the agreement would have been set aside, and Rhode Island restored to the true charter line? We think not. Agree-
*272 ments thus obtained * cannot deprive the complainant of territory, which belonged to her before; unless she has forfeited her title to relief, by acquiescence or unreasonable delay.

But it has been argued, on the part of the defendant, that assuming the agreement to have been made by mistake, and that the complainant would have been entitled to set it aside, if she had prosecuted her claim within a reasonable time; yet, as Massachusetts entered into the disputed territory immediately after the agreement, and has held it ever since, the complainant is too late in seeking relief; that after such a lapse of time, she is barred by prescription, or must be presumed to have acquiesced in the boundary agreed upon; and that if she did not acquiesce, she has been guilty of such laches and negligence in prosecuting her claim, that she is no longer entitled to the countenance of a Court of Chancery.

The answer to this argument is a very plain one. The complainant avers that she never acquiesced in the boundary claimed by the defendant, but has continually resisted it since she discovered the mistake; and that she has been prevented from prosecuting her claim at an earlier day, by the circumstance mentioned in her bill. These averments and allegations, in the present state of the pleadings, must be taken as true; and it is not necessary to decide now, whether they are sufficient to excuse the delay. But when it is admitted by the demurrer that she never acquiesced, and has from time to time made efforts to regain the territory by negotiations with Massachusetts, and was prevented by the circumstances she mentions from appealing to the proper tribunal to grant her redress; we cannot undertake to say, that the possession of Massachusetts has been such as to give her a title by prescription: or that the laches and negligence of Rhode Island have been such as to forfeit her right to the interposition of a Court of Equity.

In cases between individuals, where the statute of limitations would be a bar at law, the same rule is undoubtedly applied in a Court of Equity. And when the fact appears on the face of the bill, and no circumstances are stated, which take the case out of the operation of the act; the defendant may undoubtedly take advantage of it by demurrer, and is not bound to plead or answer.
*273 The time necessary to operate as a bar in equity, is * fixed at twenty years, by analogy to the statute of limitations; and the rule is stated in Story's Com. on Eq. Pl. 389, and is supported and illustrated by many authorities

cited in the notes. It was recognised in this Court in the case of Elmendorf v. Taylor, 10 Wheat. 168–175. But it would be impossible with any semblance of justice to adopt such a rule of limitation in the case before us. For here two political communities are concerned, who cannot act with the same promptness as individuals; the boundary in question was in a wild unsettled country, and the error not likely to be discovered, until the lands were granted by the respective colonies, and the settlements approached the disputed line: and the only tribunal that could relieve after the mistake was discovered, was on the other side of the Atlantic, and was not bound to hear the case and proceed to judgment, except when it suited its own convenience. The same reasons that prevent the bar of limitations, make it equally evident, that a possession so obtained, and held by Massachusetts, under such circumstances, cannot give a title by prescription.

The demurrer, therefore, must be overruled.

But the question upon the agreements, as well as that upon the lapse of time, may assume a very different aspect, if the defendant answers and denies the mistake; and relies upon the lapse of time as evidence of acquiescence, or of such negligence and laches as will deprive the party of his right to the aid of a Court of Equity. It will then be open to him to show that there was no mistake; that the line agreed on is the true charter line; or that such must be presumed to have been the construction given to the charters by the commissioners of both colonies; or that the agreement was the compromise of a disputed boundary, upon which each party must be supposed to have had equal means of knowledge.

So, too, in relation to the facts stated in the bill to account for the delay. It will be in the power of the complainant to show, if she can, that her long-continued ignorance of an error (which, if it be one, was palpable and open,) was occasioned by the wild and unsettled state of the country; and that the subsequent delay was produced by circumstances sufficiently cogent to justify
*274 it upon principles of justice and equity; or was assented to by * Massachusetts, or occasioned by her conduct. And, on the other hand, it will be the right of the defendant to show, if she can, that Rhode Island could not have been ignorant of the true position of this line until 1740; or, if she remained in ignorance until that time, that it must have arisen from such negligence and inattention to her rights, as would render it inexcusable; and should be treated, therefore, as if it had been acquiescence with knowledge: or she may show that, after the mistake is admitted to have been discovered, Rhode Island was guilty of laches in not prosecuting her rights in the proper forum, and that the excuses offered for the delay are altogether unfounded or insufficient; and that Massachusetts never assented to it, nor occasioned it.

We state these questions as points that will remain open upon the final hearing, for the purpose of showing that the real merits of the controversy could not have been finally disposed of upon the present pleadings; but without meaning to say that other questions may not be made by the parties, if they shall suppose them to arise upon the proceeding hereafter to be had. The points above suggested, which are excluded by the case as it now stands, make it evident that this controversy ought to be more fully before the Court, upon the answer, and the proofs to be offered on both sides, before it is finally disposed of.

The Court will, therefore, order and decree that the demurrer be overruled; and that the defendant answer the complainant's bill on or before the first day of August next.

This cause came on to be heard on the amended bill and demurrer, and was argued by counsel. On consideration whereof, it is now here ordered by this Court, that the said demurrer be, and the same is hereby, overruled; and it is also now further here ordered by this Court, that the defendant answer the bill of complaint as amended, on or before the first day of August next.

State of Rhode Island, Complainant, v. State of Massachusetts, Defendant.

Supreme Court of the United States, 1846.

[4 *Howard,* 591.]

The grant of Massachusetts, confirmed in 1629, included the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof."

In 1662, the grant of Connecticut called to be bounded on the north by the line of the Massachusetts plantations.

In 1663, the grant of Rhode Island called to be bounded on the north by the southerly line of Massachusetts.

Whether the measurement of the three miles shall be from the body of the river, or from the head-waters of the streams which fall into it, is not clear. The charter may be construed either way without doing violence to its language.

The early exposition of it is not to be disregarded, although it may not be conclusive.

In 1642, Woodward and Saffrey fixed a station three miles south of the southernmost part of one of the tributaries of Charles River.

An express order of the crown was not necessary to run this line, as it was not then a case of disputed boundary.

In 1702, commissioners were appointed by Massachusetts and Rhode Island to run the boundary-line, who admitted the correctness of the former line.

In 1710, Rhode Island appointed an agent to conclude the matter on such terms as he might judge most proper, who agreed that the stake set up by Woodward and Saffrey should be considered as the commencement of the line.

In 1711, Rhode Island sanctioned this agreement.

In 1718, Rhode Island again appointed commissioners with power to settle the line, who agreed that the line should begin at the same place. This was accepted by Massachusetts and Rhode Island, the line run accordingly by commissioners, and the running approved by Rhode Island.

The allegation that the commissioners of Rhode Island were mistaken as to a fact, and believed that the stake was within three miles of the main river and not one of its tributaries, is difficult to establish, and cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge.

If the first commission was mistaken, it almost surpasses belief that the second should again be misled.

To sustain the allegation of a mistake, it must be made to appear, not only that the station was not within the charter, but that the commissioners believed it to be within three miles of the river, and that they had no knowledge of a fact as to the location of it which should have led them to make inquiry on the subject.

Even if the calls of the charter had been deviated from, which is not clear, still Rhode Island would be bound, because her commissioners were authorized to compromise the dispute.

It is doubtful whether a court of chancery could relieve against a mistake committed by so high an agency, in a recent occurrence. It is certain that it could not, except on the clearest proof of mistake.

This mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station.

Even if the mistake were proved, it would be difficult to disturb a possession of two centuries by Massachusetts under an assertion of right, with the claim admitted by Rhode Island and other colonies in the most solemn form.

*592 *For the security of rights, whether of states or individuals, long possession, under a claim of title, is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety, than in a case of disputed boundary.

THIS was a case of original jurisdiction in the Supreme Court, which now came up for final argument, having been partly discussed at a former term, and reported in 12 Peters.

A full statement of the case, with an analysis of the historical documents filed by the respective parties, would require a volume. The facts are summarily recited in the opinion of the court, which the reader is requested to peruse before reading the arguments of counsel.

The case was argued by *Mr. Randolph* and *Mr. Whipple,* on the part of Rhode Island, and by *Mr. Choate* and *Mr. Webster,* on the part of Massachusetts.

The points of the arguments will be sufficiently understood by transcribing the briefs of the respective counsel. *Mr. Randolph* opened the case for the complainant. *Mr. Choate* and *Mr. Webster* followed, on the part of the defendant, and *Mr. Whipple* concluded the argument, on behalf of Rhode Island.

The brief on the part of the complainant was as follows:—

1st. That the words in the charter of Massachusetts of 1628, "three miles north of the Merrimack River, and the most northerly part thereof, and three miles south of Charles River, and the most southerly part thereof," according to their usual, ordinary, and long-established import, authorized lines three miles north and south of the Merrimack and Charles proper, and did not comprehend the tributary streams of either.

2d. That this was the construction given to the above words by the first settlers, and the colonial government of Massachusetts; that they not only thus limited their claim, but erected a bound-house three miles north of the Merrimack proper, near its mouth, in 1636, at a period when rival and opposing claims, as well as adversary settlements all along the line, forewarned her that she had reached the utmost limit of her chartered rights.

3d. That, notwithstanding these stimulating inducements, Massachusetts neglected to exercise any jurisdiction over a very large body of inhabitants, who had possessed the territory immediately north of her from 1621 until 1641, when, upon "the reiterated and earnest solicitation of the inhabitants," she received under her protection these inhabitants, who, according to her subsequent and

very ambitious pretensions, had been all along her own people, upon her own soil, and famishing for want of sustenance and protection from their own government.

4th. That in 1638, 1639, and up to 1642, Massachusetts surveyed
*593 * both her northern and southern lines. Taking the same principle as her guide on both her borders, she found the source of the tributary streams of the Charles on the south, and the Merrimack on the north, running her south line at or near the Woodward and Saffrey station, and her north from some part of Lake Winnepiseogee, thereby embracing all the State of New Hampshire, and nearly all the State of Maine, and she extended a jurisdiction, savoring strongly of conservatism, if not of severity, over both.

5th. That Massachusetts continued to exercise her jurisdiction over these extended limits from 1641 till 1676, except being ordered away from Maine by the king's commissioners, somewhere about 1660, which order she disobeyed, when John Mason, the proprietor of New Hampshire, presented his petition to the king. The merits of the claims were closely scrutinized by the king and council, aided by the chief justices of the King's Bench and Common Pleas. Massachusetts was unsuccessful in her new pretensions, and obliged to retire to the old bound-house, upon the Merrimack proper.

6th. That the decree of the king and council of 1677 was not a judicial decision merely, which other judicial bodies are at liberty to respect or not, according to its merits, but the decision of a grantor in relation to a grant revocable in its very nature,—a grant of jurisdiction, and not of territory; that consequently the will of the king, thus expressed, was tantamount to a revocation of the old grant and the issuing of a new one.

7th. That the agreement of 1710 and 1718 was entered into by the Rhode Island commissioners, upon the representation of the Massachusetts commissioners that the Woodward and Saffrey station was three miles from Charles River proper, and not three miles away from any of its tributary streams, as is stated in the answer of Massachusetts. That no such pretension was then made, or ever made by Massachusetts after said decision of 1677. On the contrary, the whole entire agreement of 1710–1718 was entered into by Rhode Island, under the full belief that said station was three miles, and no more, from Charles River proper.

8th. That the only matter in dispute between said commissioners, from the first to the last, was not as to the station or starting-place, but in regard to the course of the line; that no compromise was ever proposed by either party as to the starting-point; that both parties agreed upon the Woodward and Saffrey station, because it was represented and believed to be three miles from Charles River, proper, according to charter; and that this mistake was not discovered until 1750.

9th. That in 1750 Rhode Island appointed commissioners to meet those of Massachusetts, in order to complete the execution of the agreement of 1710–1718; that being unable to find the Woodward and Saffrey station (still
*594 believed to be three miles from * Charles River proper), they were obliged to measure three miles from the river, and run an east and west line from its termination; that they erected monuments upon that line (four miles north of the pretended Woodward and Saffrey station), and the State of Rhode Island has claimed to that line, indicated by said bounds, still remaining, from that day to the present.

10th. That it was never pretended by Massachusetts that the Woodward and Saffrey station was the fruit of compromise, or that it was three miles from the tributaries of Charles River, until as late as 1790, when the commissioners of Massachusetts endeavoured to defend their claims upon that basis; that, on the contrary, Massachusetts, from 1710–1718 up to 1790, through her commissioners,

uniformly claimed to the Woodward and Saffrey station, as being according to charter; and the agreement of Rhode Island of 1710–1718, as her title, and her only title, according to charter.

11th. That the assertion of the answer, that Massachusetts had claimed still further south (to the angle tree), and that Rhode Island claimed to Charles River proper, and that, upon these rival and opposing claims, a medium station was adopted, is contrary to the entire body of the evidence in the case, contrary to the fact, and mainly, if not entirely, the offspring of the active imaginings of learned and anxious counsel.

12th. That the answer is no evidence, coming from a corporation, in any case; much more as to matter not responsive to the bill.

13th. That Massachusetts never granted to the town of Providence the five thousand acres of land stipulated and covenanted to be granted by said agreement of 1710–1718; and that, in a court of equity, although covenants are independent, yet one will not be enforced without a full performance of the other. Best on Presumptions.

14th. Upon these facts the plaintiffs will contend that the agreement of 1710 was void,—

1. Because made under an evident and apparent mistake.

2. That it cannot operate to transfer four miles of the acknowledged territory of Rhode Island, because Rhode Island, as a colony, had no power to transfer her jurisdiction to Massachusetts.

3. That no confirmation can be presumed, because a confirmation of a void agreement is void itself.

4. Because a confirmation must have been of record in England, and also in Massachusetts, if not in Rhode Island; and that no case has gone the length of presuming the loss of a record, without some foundations being first laid to support such presumption.

5. Because Massachusetts has always claimed under the agreement of 1710–1718, and never alleged or pretended that there was any other title.

*595 * 6. Because the subject of the bounds of Massachusetts, involving the dispute in the present case, has been at various periods before the commissioners of the king, 1664, before the king and counsel, 1677, 1737; and at various other times between Connecticut and Rhode Island; and no such confirmation has ever been suggested, but the direct reverse.

Cases as to Mistake of Facts.

"A man is presumed to know the law. But no man can be presumed to be acquainted with all matters of fact, and therefore an ignorance of facts does not import culpable negligence." Story's Equity Jurisprudence, 156.

"The general rule is, that an act alone, or contract made under a mistake or ignorance of a material fact, is voidable and relievable in equity." Ibid., 155.

If instruments be delivered up by mistake, and owing to ignorance of a transaction which would have made it unconscientious to hold the instrument and proceed at law, equity will relieve. 1 Madd. Ch. Practice. The case cited is the East India Company *v.* Donald, 9 Ves. jr., from 275. A charter-party was delivered up to the defendant after a voyage, the provisions of which he had violated, the plaintiff being ignorant of the violation. It was agreed that there was no fraud nor misrepresentation, but the court said there was a plain mistake.

Tompkins *v.* Bernet, 1 Salk., 22. One of three persons paid money on a usurious bond, and afterwards recovered it back as paid by mistake, he not knowing the fact of the usury.

Bingham *v.* Bingham, 1 Ves. sen. 126, in 1748. "An agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will.

"The bill was to have the purchase money refunded, as it appeared to have been the plaintiff's estate.

"It was insisted that it was plaintiff's own fault, to whom the title was produced, and who had time to consider it.

"Decreed for the plaintiff, with costs, and interest for the money from the time of bringing the bill; for the[n] no fraud appeared, and the defendant apprehended he had a right. Yet there was a plain mistake, such as the court was warranted to relieve against, not to suffer the defendant to run away with the money, in consideration of the sale of an estate to which he had no right."

Rhode Island gave away her own territory, instead of the territory which Massachusetts was entitled to.

Gee *v.* Spencer, 1 Vernon, 32. A release set aside by reason of the misapprehension of the party. Luxford's case cited.

2 Ves. sen. 400. A general release relieved against, as to particulars not in the knowledge of the party.

*596 * Evans *v.* Llewellyn, 2 Bro. Ch. Cas. 150. A conveyance set aside, as improvidently entered into; though no fraud or imposition.

N. B. The report of this case is more full in Cox. See Leonard *v.* Leonard, 2 Ball and Beatt. 184.

An omission in an agreement by mistake stands on the same ground as an omission by fraud. Chitty's Dig., tit. *Mistake*.

Ramsbottom *v.* Gordon, 1 Ves. & B. 168; 3 Atk. 388; 4 Bro. Ch. Cas. 514; 6 Ves. 334, note *c*.

Cocking *v.* Pratt, 1 Ves. sen. 400. J. Self, dying intestate, left a widow and daughter, then an infant, who, four months after coming of age, entered into an agreement with her mother concerning the distribution of the personal estate; which agreement was afterwards ratified by the daughter's husband. After the daughter's death, the husband brought a bill, as her administrator, to set aside the agreement, and to have a distributive share according to her right.

Master of the Rolls. "The daughter clearly did not intend to take less than her full share, her two thirds of the value, though what that was did not clearly appear; but she thought what was stipulated for her was her full share.

"The court will look with a jealous eye upon a transaction between parent and child. Whether there has been *suppressio veri* does not clearly appear.

"But there is another foundation to interpose, that it appeared afterwards that the personal estate amounted to more, and the party suffering will be permitted to come here to avail himself of that want of knowledge, not indeed in the case of a trifle, but some bounds must be set to it. The daughter would be entitled to five or six hundred pounds more, which is very material in such a sum as this, and a ground for the court to set it right. The daughter did not act on the ground of a composition, but took it as her full share; and if it appears not so, the court cannot suffer the agreement to stand. As to the ratification by the husband, he was as much in the dark."

Griffith *v.* Trapwell, June, 1732, was cited in the above case, "where one died intestate, leaving two sisters, the plaintiff's wife and the defendant's wife. The latter first got administration, and prevailed on the other to accept of an agreement for her share. There was a further agreement, that the plaintiff's wife should have a further share, reciting that she should have an equal share, and that there should be a decree for that. The plaintiff afterwards discovered the estate to be a great deal more, and brought a bill of review, and both the decree and agreement were set aside."

Pooley et al. *v.* Ray, 1 Peere Wms. 354. The executor of a mortgagee coming before the master, and not admitting any of his mortgage to have been
*597 paid, proved his deed, and got a report for * the whole amount of his debt, £700, which report was afterwards confirmed and made absolute. Afterwards it appeared, under the mortgagee's own hand, that £353 had been paid by the mortgagor. The defendant had paid this money away to creditors.

Master of the Rolls. "Let the master see whether there has been a double payment, and as to so much as has been overpaid it must be allowed to the plaintiffs." This, on appeal, was confirmed by Lord Cowper.

Honor *v.* Honor, 1 Peere Wms. 123. Articles, and a settlement mentioned to be made in pursuance thereof, were both made before marriage, but the settlement varied from the uses of the articles. Decreed to set the settlement aside.

Chancellor. "It is a plain mistake in varying the settlement from the articles, and this appearing upon the face of the papers, the plain reason of the thing, length of time, is immaterial." Same case, 2 Vern., 658; 1 Madd. Ch., 61.

But though a court of law will not grant a new trial merely to enable a party to get fresh witnesses, nor would a court of equity interfere on such grounds; yet where the admissions come from the party himself, upon a bill of discovery, filed after the trial, it is very different, and the court will in such case relieve. 1 Maddox's Ch. 77; Harkey *v.* Vernon, 2 Cox, 12.

Under peculiar circumstances, however, excusing or justifying the delay, courts of equity will not refuse their aid in furtherance of the rights of the party; since in such cases there is no pretence to insist on laches or negligence, as a ground of dismissal of the suit. I Story's Eq. Jurist. 503, 504; Lobdell *v.* Creag, 1 Bligh (N. S.) 255; 1 Fonbl. Eq., B. 1, ch. 4, p. 27, and notes; Jeremy Eq. Jurist., B. 3, pt. 2, ch. 5, pp. 549, 550.

If the legatee allege that he knew not of his right, time is no bar. Nor when fraud is proved. Fonbl., as above.

Garland *v.* Salem Bank, 9 Mass. R. 408. An indorser paid a note, ignorant that no demand had been made upon the maker or notice to himself, though he was advised not to pay it. Held to be a payment by mistake, and he recovered back again. 4 Mass. R. 378; 3 Mass. R. 74; 5 Burr. 2672; 1 Durn. & East, 712; 1 Bos. & Pull. 326; Doug. R. 638.

The case of The Union Bank *v.* The Bank of the United States, 3 Mass. R. 74, is a strong case. The marginal note is,—"If A., confiding, though improperly, in the mistaken affirmation of B., pay him money, A. shall recover it back."

The case was, the branch bank had received two bad checks, which they supposed they had received from the Union Bank. They sent them to the Union Bank by their messenger, stating that they came from the Union Bank; whereupon the Union Bank paid them. Between the time of paying them by the Union Bank and the discovery of the mistake, Rawson, who drew them,
*598 failed and * absconded; so that the branch bank lost the amount. Judge Parsons and the Supreme Court decided that the loss must fall on the branch bank, who committed the first error.

The cases in Douglass and Bos. & Pull. are both cases of payments by mistake, and as strong as the two cases in Mass. Reports.

Cases of Settlements and Marriage Articles being reformed on Account of Mistake.

Randall *v.* Randall, 2 Peere Wms. 464, in 1728. In that case, the husband had confessed, under hand and seal, that both the articles and settlement limited the estate to his heirs in fee, when it was the intention of the mother of his wife to limit it to the heirs of the wife in fee. The articles and settlement were reformed.

Lord Chancellor King decreed the estates to be settled upon the heirs of the wife in fee.

West *v.* Erissey, 2 Peere Wms. 349, in 1726. Where the settlement made, before the marriage, varied materially from the articles, but stated to be made "in pursuance of the articles and performance," the settlement will be presumed to depart from the articles by mistake.

See note of Cox to the above case. See 3 Bro. Parl. Cases, 347, in 1727.

Honor *v.* Honor, 1 Peere Wms. 123, in 1710, before Lord Chancellor Cowper, establishes the same principle. The articles limited the estates to the heirs of the body of the wife. The settlement (made before marriage, and in pursuance of the articles) was to the heirs of the body of the husband of the wife begotten.

Lord Chancellor. "It is a plain mistake in making the settlement vary from the articles."

After reciting the articles, he further says,—"And the articles being so, the settlement, which is said to be in pursuance of the articles, shows there was no alteration of the intention, nor any new agreement, between the making of the articles and the settlement. And this appearing upon the face of the articles and settlement, and in the plain reason of the thing, length of time is immaterial."

In the case of Motteaux *v.* The London Ins. Co., 1 Atk. 545, in 1739, Halhead, as agent of the plaintiff, paid the defendants fifteen pounds premium, being at the rate of three per cent., which was the current premium then, upon the ship, at and from Fort St. George, and a label of such agreement was, on the 7th of August, 1733, entered in a book, and subscribed by Halhead and two of the directors. The policy was made out from Fort St. George. Lord Hardwicke rectified the mistake, saying that the policy ought to have conformed to the label.

In Baker *v.* Paine, 1 Ves. sen. 458, in 1750, Lord Hardwicke rectified an agreement by previous minutes of the parties.

*599 In Barstow *v.* Kilvington, 5 Ves. jr. 592, Lord Eldon rectified * a settlement by a previous letter of the party. See also a similar case cited in a note to that case.

Cases of Compromise.

If a person, after due deliberation, enter into agreement for the purpose of compromising a claim made *bona fide,* to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a court of equity, without inquiring whether he in truth was liable to the claim, will compel a specific performance. Atwood *v.* ———, 1 Russell, 353; 5 Russell, 149, affirmed on appeal.

If a party, ignorant of plain and settled principle of law, is induced to yield a portion of his indisputable right, equity will relieve; but where title is doubtful, and with due deliberation he enters into compromise, no relief is given, nor is consideration inquired into. 1 Sim. & Stu. 564.

No remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. Goodman *v.* Sayers, 2 Jac. & Walk. 249.

A compromise of rights, doubtful in point of law, but founded upon a misrepresentation or suppression of facts in the knowledge of one of the parties only, cannot be supported. Leonard *v.* Leonard, 2 Ball & Beatt. 171.

To constitute a fair compromise of right doubtful in point of law, the facts creating this doubt should be fairly stated. Ibid. 181.

It is essential to the validity of a compromise that both parties be in equal ignorance. Ibid. 182.

Defence of compromise is not proper for answer, but for plea only. 1 Ball & Beatt. 323.

Authorities as to Presumptions of Title.

"A grant of land will never be presumed from lapse of time, unless it be so great as to create the belief that it was actually made, or unless the facts and circumstances show that the party to whom it is presumed to have been made was legally or equitably entitled to it." Note to Mathews on Presumptions, 296, ed. of 1830; 6 Cowen, 706; 3 Johns. 269, 109; 1 Wash. C. C. R. 70.

No possession of one claiming under a defective title can raise a presumption of a good title. Matthews, 198, note; 5 Harris & Johns. 230; 1 Harris & Johns. 18; Beal *v.* Lynn, 6 Harris & Johns. 336.

"Presumptions of law are suppositions or opinions previously formed on questions of frequent occurrence, being found, from experience, to be generally accordant with truth, and remain of force until repelled by contrary evidence.

*600 * "Presumptions of fact are conclusions drawn from particular circumstances. Many of the presumptions of law were formerly considered too powerful to admit of contradiction, but this doctrine is now confined principally to the doctrine of estoppels." Mathews, 2; Phillips Evidence, 6th ed., 146.

"The grounds upon which legal presumptions rest are various. In some cases on the laws of nature and the general principles of justice, on the nature and general incidents of property. In others, on those innate principles of self-interest and prudence, which generally govern the conduct of men," &c. Mathews 2.

Other legal presumptions originate in the policy of the law. Of this description, however, as they relate to property, examples are rare.

"Presumptions of fact are such as are usually found by experience to be consequent upon, or coincident with, the facts presumed. They must correspond with, and be adequate to account for, the circumstances actually proved." Mathews, 2.

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents, &c., unless proved to have been lost or destroyed." Mathews, 4, in note; Brunswick *v.* McKean, 4 Greenleaf, 511.

"Presumptions from evidence of the existence of particular facts are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." Ibid., p. 5, note; Bank of United States *v.* Corcoran, 2 Peters S. C. R. 133.

"Following up this principle, courts will, in favor of long possession, presume as well the existence of the needful instruments of conveyance, as the observance of all such acts and solemnities as are requisite to make actual assurances valid."

Fines and recoveries are an exception, which cannot be presumed without evidence directly pointing to them.

Act of parliament, and grants from the crown, though assurances of record, are constantly presumed, within even the time of legal memory. Cowp. 102, 215; Jac. & Walk. 63, 159; 11 East, 488. See Am. authorities in note, p. 6, Mathews.

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands. The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it. It is absurd to say that a man has relinquished a right of which he is not aware." Mathews, 17, 18; Sel. Ch. Cas. 11; 2 Peere Wms. 736; per Sir Wm. Grant, 2 Mer. 362.

*601 In England there is but little difference between the doctrine of * prescription, and the doctrine of presuming lost grants, in regard to the objects embraced by the two principles.

The doctrine of prescription never extended to lands in fee, or corporeal hereditaments, nor did it extend to such incorporeal rights as could exist only by matter of record; such as many species of royal franchise, deodands, traitors' or felons' goods, &c.

On the other hand, the doctrine of presuming grants never extended to corporeal hereditaments; but unlike the doctrine of prescription, it embraced all incorporeal hereditaments, whether evidenced by matters of record, or purely by grant. Patents from the crown, and acts of parliament even, were presumed to exist.

The great difference between the two doctrines consisted mainly in the length of time necessary for their successful operation.

Under the doctrine of prescription, as it exists in England to this day, immemorial usage must be established. Therefore, if it appears that the title to be presumed had no existence at any time subsequent to the 1st Rich. 1 (1189), there is an end to the power and agency of prescription.

On the other hand, while the doctrine of presuming grants embraced a rather wider range of objects or titles, its children were deemed legitimate, though comparatively of modern birth.

This latter doctrine, however, during the whole of its minority, experienced considerable opposition from many wise, as well as learned, lawyers. 2 Ev. Poth. 139.

The parliament of England, by the 2d and 3d Wm. 4 (1822), were obliged to remedy some of the evils growing out of judicial fictions. The real property commissioners express themselves as follows:—

"Amid these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seized in fee of the servient, to another seized in fee of the dominant, tenement. But, besides the objection of its being well known to the counsel, judge, and jury, that the plea is unfounded in fact, the object is often frustrated by proof of the fact of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the act."

"In addition to all this," says Best, "it was well observed, that the requiring juries to make artificial presumption of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed. In a word, it became apparent that the evil could only be remedied by legislation, and the statutes of Wm. 4 were passed for that purpose."

*602 * "Whether deeds of conveyance can be presumed, in cases where the law has made provision for their registration, has been doubted.

"The point was argued but not decided, in Doe *v.* Hirst, 11 Price. 475. The better opinion seems to be, that though the court will not in such cases presume the existence of the deed as a mere inference of law, yet the fact is open for the jury to find, as in other cases." Note to 1 Greenl. Ev. 52.

In the United States, while the doctrine of presuming a grant has been applied to corporeal as well as to incorporeal hereditaments, and the sphere of its operation very much enlarged, yet, at the same time, the principle of its operation has been circumscribed within very narrow, and in all probability very safe, grounds. It is placed beyond the reach of the innovation of mere book lawyers and book judges, and rests, as a mere matter of fact, upon the common sense of a jury.

The judges in England were obliged to flee to this matter of fact view, as a refuge from the rapidly increasing evils growing out of artificial presumptions. In this country, upon this subject, there are no artificial presumptions. It is simply a case of circumstantial evidence.

In 6 Cowen, 725, it is said:—"A grant of land will never be presumed, unless the lapse of time is so great as to create a belief that it was actually made; or unless the facts and circumstances show, that the party to whom it is presumed to have been made was legally or equitably entitled to it." Mathews on Presumption, 296, note, ed. 1836; 6 Cowen, 706; 3 Johns. 109, 269; 1 Wash. C. C. Rep. 70.

Same principle in 2 Wendell 13–15.

In Ricard *v.* Williams, 7 Wheat. 59, this court decided, that "Presumptions of a grant, arising from a lapse of time, are applied to corporeal as well as incorporeal hereditaments. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are entirely consistent with the non-existence of a grant. *A fortiori,* they cannot arise when the claim is of such a nature as is at variance with the supposition of a grant."

"Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents in the custody of officers charged with their preservation, unless proved to have been lost or destroyed." Cowen & Hill's Notes to Phillips, Part 1, p. 364; Brunswick *v.* McKean, 4 Greenl. 508.

See Cowen & Hill's notes, generally, on subject of presumptions.

*603 "No possession of one claiming under a defective title can * raise a presumption of a good title." Mathews, 198, note; 5 Harris & Johns. 230; 1 Ibid., 10; 6 Ibid., 336.

"Presumptions from evidence, of the existence of particular facts, are, in many cases, if not all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or such as cannot fairly warrant a jury in presuming it, the court would err in instructing them that they are at liberty to presume it." Bank of United States *v.* Corcoran, 2 Peters, 133.

"Ignorance has sometimes, in courts of equity, been held to afford an answer to averred releases of demands.

"The desertion of a right, it has been judicially observed, always supposes a previous knowledge of it.

"It is absurd to say, that a man has relinquished a right of which he is not aware."

Mathews on Pres., 17, 18; Sel. Ch. Cases, 11; 2 Peere Wms. 730; per Sir William Grant, 2 Mer. 362.

Cases upon Presumptive Evidence.

Beedle *v.* Beard et al., in 4th Ja. 1 (1627), 12 Coke, 5.

In 31st Ed. 1 (1303), the king being seized of the manor of Kimbolton, to which the advowson of the church was appendant, granted said manor, with the appurtenances, to Humphrey de Bohun, Earl of Hereford, in tail general. Humphrey de Bohun, the issue in tail, by his deed, in the 40th Ed. 3 (1367), granted the said advowson, then full of an incumbent, to the prior of Stonely and his successors; and at the next avoidance they held it *in proprio usus;* and upon this appropriation made *concurrentibus iis quere in jure requirunter.* After the death of the incumbent, the said prior and his successors held the said church appropriate, until the dissolution of the monastery. In 27th Hen. 8 (1630), the said manor descended to Edw., Duke of Buckingham, as issue to said estate tail. The reversion descended to Henry VIII. The Duke, in 13th Hen. 8, was attaint of high treason. In 14th Hen. 8, the king granted said manor, &c., with all advow-

sons appendant, to Richard Wingfield, and the heirs male of his body. In 16th Hen. 8, it was enacted by parliament, that the Duke shall forfeit all manors, &c., advowsons, &c., which he had in 4th Hen. 8.

The king, 37th Hen. 8, "granted and sold for money the said rectory, &c., of Kimbolton, as inappropriate in fee, which by mesne conveyance came to the plaintiff for £12,000. In the 37 Eliz., Beard, the defendant, did obtain a presentation of the queen by lapse, pretending that the said church was not lawfully appropriate to the said prior of Stonely.

"1st. For this, that Humphrey, who did grant it to the said prior, had nothing in it, for that it did not pass to his ancestor by these words, *Manorium cum pertinentibus*.

*604 * In the case, the advowson was bought and paid for in 1303; was in the possession of the first taker, Earl of Hereford, until 1367, sixty-four years. It was then granted to a corporation, the prior of Stonely, in whose possession it remained until the dissolution of the monasteries, in the reign of Henry VIII., 1530, one hundred and sixty-three years more. It descended to the Duke of Buckingham, upon his attainder was forfeited to the crown, and Henry VIII. granted the manor and advowson to the plaintiff for a pecuniary consideration. The action was tried in 4th Ja. 1, 1627, three hundred and twenty-four years after the possession commenced under the first grant.

Mayor of Kingston upon Hull *v.* Horner, Cowper 102, in 1774.

The declaration stated the right of the plaintiff, as mayor, to certain water-bailiff dues, for certain goods imported into Kingston.

In support of the title, the plaintiff produced,—

1. An entry upon the corporation books, entitled "A particular note of all such duties, &c., as by the water-bailiffs are to be received for the use of the mayor and burgesses of Kingston upon Hull, according to the order prescribed and set down in the year 1441, and continued and put in use from that time to the present day, 1st April, 1575." In this list were included the duties in question.

2. An order of the corporation, in the 13th Eliz., requiring the water-bailiff to keep these duties separate, &c.

Then followed a particular account of the receipt of these duties from 1545 to 1646, from 1648 to 1678, of persons who had rented the office of water-bailiff; also an account of dues for three years in 1726; and the testimony of persons who had paid the dues from 1734; together with an estimate of repairs by the corporation to the amount of £15,000.

The defence was, that the earliest book of the corporation was the 19th Ed. 3 (1346), and the date of their charter the 27th Ed. 1 (1299), a century subsequent to the time of legal memory, Rich. 1, 1199.

That the title, if any, to the duties in question could be supported only by prescription or charter. That the first did not exist, they being a corporation within legal memory. That the charter authorized the erection of the port, but granted no duties.

To this it was answered, that a usage of three hundred years was a sufficient ground to presume a grant of the duties, in consideration of the repairs, which it was in proof the corporation had constantly done from 1441 to the bringing the action.

Lord Mansfield said, there were two grounds to show that the evidence was sufficient to go to the jury:—

1. That there existed a port, with duties belonging to the king, previous to the charter of 5th Rich. 2. Consequently, a grant by Rich. 2 of the port would carry the duties along with it.

*605 *2. If this charter erected a new port, the king could not create

duties. But that there might be some charter from the king creating and giving these duties, upon a ground which would support them in point of law, namely, upon the consideration of repairs, and the general advantage to be derived to the public from its being properly kept up.

The question that arises upon it is, "Whether, upon the evidence, it was properly left to the jury to presume such grant between 1382 (date of charter) and 1441" (time of first collecting the duties). p. 106.

Lord Mansfield (p. 108). "A jury is concluded, by the statute of limitations, as a bar. So, in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right." Any written evidence, showing a time when the claim did not exist, is an answer to prescription. p. 109.

"But length of time, used merely by way of evidence, may be left to a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." p. 109.

"In questions of this kind, length of time goes a great way; but there is no positive rule which says, that a hundred and fifty years' possession, or any other length of time within memory, is a sufficient ground to presume a charter." p. 110.

The case of Johnson & Humphrey *v.* Ireland, 11 East, 279, presented the question, whether "the enfranchisement of copyhold may, upon proper evidence, be presumed even against the house."

The evidence offered and rejected by Heath was an entry, in the parliamentary survey, of sixpence rent against these premises for a hundred and sixty years, in the column of freehold, instead of six shillings and sixpence, in the column of copyhold.

The court admitted the evidence, observing that there were persons, between 1636 and 1649, competent to make the enfranchisement, "the king having continued his functions the greater part of the time." p. 283.

Fenwick *v.* Reed, 5 Barn. & Ald. 228, in 1821. In this case, Reed, the defendant, took possession of the estates of the plaintiff, in 1750, under an agreement to remain in possession until the debts were satisfied out of the rents and profits. In 1801, a suit in chancery was instituted by the plaintiff. Much evidence was offered on both sides. Bayley, Justice, told the jury, "that the real question was, whether they believed that a conveyance had actually taken place."

The court approved of this direction, and said,—"In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the case may be different. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance. As
*606 the defendant's * ancestors had originally a lawful possession, it was incumbent on them to give stronger evidence of a conveyance."

Abbott, Chief Justice, also says,—"In my opinion presumptions of grants and conveyances have already gone to too great lengths, and I am not disposed to extend them farther."

Bayley said,—"The question for the jury was a mere question of fact, whether there had been such a conveyance. The deeds of 1747 and 1752 were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it ever existed."

The case of Howson *v.* Waterton, 3 Barn. & Ald. 150 (1819), was a conveyance of copyhold lands (in 1743, by surrender in open court) to charitable uses; was declared void, for not complying with the provisions of 9 Geo. 2, ch. 36, which requires all conveyances to be executed in the presence of two witnesses, to be enrolled in chancery, and for the party to survive one year.

The court was asked to presume an enrolment.

Abbott, Chief Justice, said,—"No instance can be found, where the court have said that an enrolment has been presumed."

Bayley said,—"As to presuming an enrolment, if it had appeared that the rolls of chancery had been searched, and a chasm had been found about that period, it might have been different." p. 142.

Best, on Presumptions, p. 149, says,—"It has been said, (Beanland *v.* Hirst, Price, 475; Phill. & Am. Ev., 476), that the registration of the memorial of a deed in a register county cannot be presumed, and that direct proof must be adduced.

But it is difficult to contend, "that there can be any matter of fact which a jury may not presume from possession and circumstances, when that possession and circumstances are sufficiently strong to convince them of its existence. The true conclusion seems to be, that in the case of a memorial of a deed requiring registry, the court will not direct them to make any artificial presumption."

Best cites 1 Greenleaf's Law Ev., Ar. 46, p. 52. "The same presumption, says Greenleaf (p. 52), has been advised in regard to the reconveyance of mortgages, conveyances from old to new trustees, mesne assignments of leases, and any other species of documentary evidence and acts *in pais* which are necessary for the support of a title, in all other respects evidently just."

"It is sufficient that the party who asks for the aid of this presumption has proved a title to the beneficial ownership, and a long possession not inconsistent therewith; and has made it not unreasonable to believe, that the deed of conveyance, or other act essential to the title, was duly executed. Where these merits are wanting, the jury are not advised to make the presumption." He cites,
*607 among numerous other authorities, Doe *v.* Cooke, 6 Bing. * 174; 19 Serg. & Lowb. 44; Doe *v.* Reed, 5 Barn. & Ald. 232: Livett *v.* Wilson, 3 Bing. 115; 11 Serg. & Lowb. 57; 2 Wend. 14–37.

The case of Livett *v.* Wilson, 3 Bing. 115. "Defendant pleaded a right of way, by deed subsequently lost. Plaintiff traversed the grant. There was contradictory evidence. The judge directed the jury, that, if upon this issue they thought defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, they would find for the defendant. If they thought there had been no way granted by deed, they would find for the plaintiff."

The rule to show cause why the verdict for the plaintiff should not be set aside was discharged.

Best, C. J., said, that upon an uninterrupted usage of twenty years, the jury would be authorized to presume a deed. But even in such a case a judge would not be justified in saying they must, but might, find a deed.

Burrough, J., said,—"If there had been such a deed, it is not probable the way would have been constantly in dispute."

The case of Doe *v.* Cooke, 6 Bing. 174 (19 Serg. & Lowb. 44), was a case of more than twenty years' possession; but the Court of Common Pleas would not presume the surrender of a term. After stating the particular circumstances of that case, Tindall, C. J., says:—"No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the fact to be presumed, and in such cases only, has it ever been allowed."

Sir Samuel Romilly said, in Whally *v.* Whally, 1 Merivale's R. 441 (1814):—"Length of time cannot affect this case. The statute does not apply, and it is

not easy to see for what purpose it is here insisted upon. Time is no bar to relief in equity, unless it be in the excepted cases of mortgage, &c. In all other cases it only operates by way of evidence."

The bill was filed to set aside a conveyance from an uncle to a nephew after forty years, upon a charge of fraud and gross inadequacy of price. The court sustained the deed, upon the ground that it was not merely for a pecuniary consideration, but, as it stated, was also for "love and affection"; and consequently the court, Lord Eldon, said nothing about time.

The opposite counsel admitted that time was not a bar, by a strict analogy to the rule of law, but that it afforded evidence sufficient to raise a presumption. p. 444.

McDonald *v.* McDonald, 1 Bligh's R., House of Lords, 1819, was
*608 the case of a client against his agent and attorney, upon a * transaction of twenty-five years standing. It was a case of confidence.

The Lord Chancellor Redesdale says:—"The case, therefore, by its circumstances, is taken out of the principles of presumption and prescription, which ought to protect professional men. On these grounds, and a fair view of the case, as a juryman, it is my opinion that the bond was not intimated."

Wood *v.* Veal, 5 Barn. & Ald. 454, was the case of land under lease from 1719 to 1818; and as far as memory could extend had been used by the public, and lighted, paved, and watched, under an act of parliament, in which it was enumerated as one of the streets of Westminster.

It was submitted to the jury by the court whether there had been a dedication to the public, telling them that there might be a highway without a thoroughfare, and telling them that nothing done by the lessee, without the consent of the owner of the fee, would give the right of way to the public. Bayley, J., said,—"Where the consent is by a person having a limited right, it can only continue for a limited period."

Same principle. Barkee *v.* Richardson, 4 Barn. & Ald. 579.

Wright *v.* Smythies, 10 East, 409, is a decision, that no presumption of a grant enrolled can be presumed, because if it existed it might be shown.

In Vooght *v.* Winch, 2 Barn. & Ald. 663, it was said,—"If it is admitted that this was a public, navigable river, and that all his Majesty's subjects had a right to use it, an obstruction for twenty years would not have the effect of preventing his Majesty's subjects from using it." p. 667.

In Mathews on Presumptions, p. 17, it is said,—"That no length of time will raise a presumption in favor of encroachments on the public; at least, no period has as yet been mentioned as binding the community."

Carter *v.* Murcott, 4 Burr. 2163, and 7 East, 199, are cited.

In Stoughton et al. *v.* Baker, 4 Mass. Parsons, J., says:—"Every owner of a water-mill or dam holds it on the condition or limitation that a sufficient passage-way is left for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, for no laches can be imputed to the government, and against it no time runs."

In Livett *v.* Wilson, 3 Bing. R. 115, the court instructed the jury, that if they thought there was no deed of the right of way, they must find accordingly, notwithstanding the possession.

Mathews, p. 17, says,—"The apparent assent of the adverse party is, in all cases of this sort, the true and essential source of inference; but it is evident, that, without a total disregard to fact, this cannot be maintained where the claim has formed a constant source of contest."

*609 * See Mathews, 19, also, as to a body of creditors, under an assignment to trustees for their benefit, being also an answer to lapse of time,

such persons not being expected, in their collective capacity, to use the same diligence as individuals. 3 Ves. 740; 12 Ves. 136, 158.

Piatt *v.* Vattier et al., 9 Peters, 416, 405 (1835), was a case of clear adverse possession for thirty years, without a claim even, or the shadow of an excuse. The court say, p. 416,—"And we are of opinion that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit, independently of the statute. There has been a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in Bartel; and no circumstances are stated in the bill, or shown in evidence, which overcome the decisive influence of such an adverse possession." Per Story, J.

Miller *v.* McIntire, 6 Peters, 61, 62 (1832), was the common case of a bill in a court of equity, where the statute of limitation was applied by analogy, and not where time was used as evidence.

Points of the Respondents.

The complainant's case proceeds upon two propositions; first, that the charter of Massachusetts of March, 1628, intended to trace as her southern boundary a line *three miles south of what is now the main stream of what is now called Charles River;* second, that therefore the complainant has the right to have the same line of boundary decreed at this time, without regard to any thing which has taken place since the date of the charter.

Both these propositions the respondents controvert. And, first, they contend, that the charter intended to trace, as their southern boundary, a line three miles south *of all the waters of the Charles, as a geographical whole; three miles south of its basin or valley, and of the sources and contributory streams which feed and preserve it.*

To enable the court to determine between these two constructions, they will contend, that it is competent to advert to a great body of extrinsic circumstances and evidence, the character, situation, age, and objects of the parties, their knowledge or ignorance of the localities, the existence or non-existence of distinctive names of contributory streams, and, above all, to the contemporary exposition of the instrument afforded by the acts of parties in the age of the charter and subsequently.

And upon this point they maintain the position, that as the language of the charter, "three miles south of Charles River, and any and every part thereof," is vague, general, and flexible, such extrinsic evidence as is above indicated may be resorted to in order to ascertain the sense in which the parties used it; that even if the language *primâ fronte* bears a particular legal sense, it may be
*610 * shown to have been used in a different one; that this might be done, even if the grant was recent, and between individuals; and that it may be done *a fortiori multo* when the instrument is ancient and is the charter of a State.

In support of this proposition of the law of evidence will be cited Greenleaf's Ev., §§ 280, 286–288, 290, 295; 3 Cowen's Phillips, 1362, 1389; 6 Pick. 63; 16 Johns. R. 14; 16 Wend. 663; 6 Mass. R. 435; 13 Pick. 261; 2 New Hamp. R. 369; 1 M. & K. 571; 6 Sim. 54; 3 Cowen's Phillips, 1403–1405; 1 Mason, 10, 12; 1 Mood & Malk. 300; 19 Johns. R. 313; 1 Bing. 445; 3 Camp. 16; 1 Conn. & Lawson, 223–225; 3 Barn. & Adolph. 728.

These cases show that the terms in this charter are so far vague and flexible, that even if they legally import the complainant's construction, it may be proved that a different one was intended. 7 Sim. 310; 3 Atk. 576. See, too, 16 Peters, 534; 2 Inst. 282; 2 Brod. & Bing. 403.

Proceeding, then, to discuss the question of the original meaning of the char-

ter, under a view of all the surrounding circumstances, the respondents will maintain,—

1. That the burden of proof is upon the complainants; and that, being out of possession, never having been in possession, and presenting the question after a lapse of more than two centuries, they should be holden to make their construction clear to judicial certainty; 13 Pick. 77; 2 Brod. & Bing. 403.

2. That the charter is to be construed most liberally in favor of the grantee, because it was a grant from a monopolist to the people of Massachusetts of that and of all generations. 1 Bancroft's History, 292, 293, 351–354; 11 Peters, 544; 7 Pick. 487.

3. That there is no circumstance or consideration in aid of the complainant's interpretation, beyond the words themselves; that they have never had possession under their interpretation; that there is no proof that the streams and fountains south of what is now the main stream of what is now Charles River have not always been reputed parts of Charles River; and that there is proof that anciently they were so reputed. See depositions of Metcalf, Cowell, Ware, and Mann, in papers put into the case by Massachusetts, pp. 30–32; 1 Douglass's Summ. 415, 463.

4. That there is no judicial evidence that the words themselves, in the age of the date of this charter, used by such parties, in such an instrument, even *primâ fronte,* bore the sense contended for by the complainants; that they do not obviously import that sense; and that, in the absence of other evidence, the court would not, against a possession of two centuries, even *primâ facie,* so construe them.

And, *e contra,* in aid of the respondent's interpretation, they will contend,—

*611 * 1. That presumption favors it, arising from long possession.

2. That if the words may bear two senses, that which is most beneficial to the grantee, the settler, and colonist will be taken, rather than that most beneficial to the monopolist grantor.

3. That the words themselves more obviously and naturally import the sense claimed by the remonstrance.

4. That their construction imputes the more probable, reasonable, and usual conduct to these parties, since, under the complainant's construction, the boundary would be a fluctuating and uncertain one, varying with reputation; and would divide a river between the states, giving the main stream to one and the sources and confluent waters to the other, thus promoting strife. Whereas the obvious design of this charter was to give the whole river to Massachusetts. 1 Howard, 186.

5. That the whole question is settled by the contemporaneous exposition; that Massachusetts, from the planting of the colony, took an open and notorious possession under, according to, and in enforcement of her present doctrine of interpretation, going more than three miles south of what is now the main stream of what is now Charles River; and that during all the period properly denominated contemporary, and down to the year 1750, neither the crown, nor Plymouth, Rhode Island, nor Connecticut, objected to that interpretation, but on the contrary expressly and repeatedly assented to it; Plymouth in 1638 and 1664, Rhode Island in 1711 and 1718, and Connecticut in 1713. And this conduct of Massachusetts, in assertion of her principle of interpretation, and this contemporary assent of all others adversely interested, constitute a body of circumstantial evidence in favor of the Massachusetts interpretation, which would be decisive of the cause on that point alone.

To show, 1. That Massachusetts took and maintained a possession from the earliest period under her present doctrine of construction will be cited.—Bill, 29,

30, 34, 35; Evidence of R. I. 47, 56, 63, 104; Borden's Evidence, 3; 1 Winthrop's Journal, 284; 1 Hutch. 108; 1 Trumb. 185, 186, 401, 402; Connecticut Memorial, 4, 8; Answer, 5; Ev. of R. I. 53, 90, 101, 104, 105, 111, 119, 121; 1 Hutch., 208; Mass. Rep. of 1791, p. 3; Mass. Ev. 22.

2. To show assent of Plymouth, Connecticut, and Rhode Island. 1. Plymouth,—1 Wint. 284; 1 Hutch. 208; 1 Doug. 401; Mass. Rep. 1791, p. 3. 2. Of Connecticut,—Ev. of R. I., 89, 121, and Connect. Memorial, 4. 3. Rhode Island,—Mass. Ev., 22; R. I. Ev., 56, 61.

3. To show that Massachusetts would not have asserted such a possession, on such a doctrine of interpretation, unless she had believed it sound, and that she knew the true meaning of her charter, see 1 Met. 388; 1 Bancroft, 439,
*612 440, 474, 476; 1 Hutch. 229, * 249–251; 1 Belknap, 106, 107, 113, 115, 116; Minot, 38, 43; Brad. Hist. of Mass. 94, 5; R. I. Ev. 46; Doug. 92.

4. That Connecticut assented with full knowledge of localities. Conn. Mem., 3, 4, 5, 7; R. I. Ev., 104, 121.

If the court should be of opinion that the complainant's interpretation is established to judicial certainty, still the respondents contend, that, by reason of matter *ex post facto,* the bill cannot be maintained,—

1. The complainant's charter bounds Rhode Island, not on the charter line of Massachusetts, but on her actual occupation at the time, which extended south to the present line. 14 Peters, 247.

2. By the Declaration of Independence the then existing boundary-lines of the States became the true lines, without regard to their historical origin, and those lines are unalterable by any jurisdiction. 12 Peters, 681.

3. That it is not competent for the complainants to bring the matter of this boundary into contestation in a court of equity, by reason of their prolonged and gross laches. 1 Story's Eq. 73 (§ 64, *a*); 1 Howard, 168, 193; 2 Story's Eq. §§ 1520, 1522; 2 Story's R. 215; Bell *v.* Sanborn, 8 Clark & Fin. 650; 1 Story's 215; 13 Pick. 393; 9 Peter's, 417; 5 Johns. Ch. 550. They are barred by time. 7 Paige, 197; 6 Peters, 61; 2 Jac. & Walk. 191; 2 Molloy, 157; 12 Eng. Ch. R.; 2 Sch. & Lef. 636.

4. That the respondents have a perfect and indefeasible title to soil and jurisdiction up to the existing line, by prescription, a title resting on a possession of more than a century, the highest and most sacred of the titles of nations. 14 Peters, 260, 261.

5. That the existing line has been conclusively established by accord, compromise, award, and treaty; by the deliberate agreements of agents, arbitrators, or ministers plenipotentiary of the complainants, whose acts were subsequently expressly and by implication ratified by the complainants themselves, as a government.

And hereunder the respondents will contend,—

1. That, in 1711, and again in 1718, commissioners were appointed by Rhode Island and Massachusetts, with full powers to determine and settle, by compromise or ascertainment, the line of boundary; and that they did agree and establish the now existing line as the boundary. R. I. Ev. 53, and *id. seq.*

2. That, in making this determination of the line, the commissioners of Rhode Island had full knowledge of all material facts; and that they were uninfluenced by any representations of the commissioners of Massachusetts; and that, if this be so, the case is concluded. 14 Peters, 260. And in support of this position, the respondents will rely on the want of proof of the complainants to
*613 show such mistake or misrepresentation, on the legal presumption * against it, on the probabilities, and on the direct and circumstantial evidence in the case.

1. That the presumptions are against it appears, because to have been ignorant of material facts would manifest a gross neglect of official duty; and this is never presumed. Greenleaf, §40, p. 47; 2 Cow. Phill. 296; 12 Wheat. 69; 3 East, 199; 19 Johns. R. 347; 11 Wheat. 74.

2. Mistake of law alone is no ground of relief. 12 Peters, 32.

That they must have known the localities. Mass. Ev. 22; R. I. Ev. 52, and *id. seq.* 55, 57.

3. That in the absence of fraud and misrepresentation of the commissioners of Massachusetts, mistake of facts by the commissioners of Rhode Island would be no ground of relief against the agreements; and that there is no proof of such fraud or misrepresentation. 14 Peters, 280; 1 Story's Eq. §§ 146–151; 2 Wheat. 178; 11 Wheat. 59; 11 Merlin, 70; 6 Toullier, 62; 4 Johns. R. 566; 9 Heineccius, 101; 9 Dowl. & Ryl. 731; 1 Story's Eq. § 1456; 14 Peters, 276; 6 Pick. 154.

4. That the votes of the Rhode Island Assembly in 1711, 1718, 1719, and 1749 (in Rhode Island Evidence), and her long acquiescence, prove or work a ratification of the acts of her commissioners. That mere silence and inaction alone, so long continued, would prove or work it; but these are unequivocal acts. Story on Agency, §§ 253, 255, 256.

5. That, to avoid the operation of those votes and acts, it is not legally competent to aver that the Assembly and government of Rhode Island were ignorant of the localities or other facts; and that, if it were competent to make that averment, it is disproved by all the presumptions, and direct and circumstantial evidence. 2 Cow. Phill. 288; 12 Wheat. 70, 76; Ang. and Amer. on Corp. 175; 11 Peters, 603; Fletcher *v.* Peck, 6 Cranch, 129. See, too, the cases *supra* to the point that official duty is presumed to be done.

6. That if the existing line is to be deserted, and a new one run according to the true sense of the charter, as an open question, it must be removed far south of its present place. Ans. 6 and 7.

In illustration of the points stated above on the part of the complainant, *Mr. Randolph* occupied three days in referring to and reading ancient grants and documents and other papers.

Mr. Choate confined himself to that branch of the argument resulting from the two following points, viz.:—

1. The true interpretation of the charter.

2. The acts of 1713, 1718, &c.

The skeleton of *Mr. Webster's* argument was this.

The case of Rhode Island rests on two propositions:—

*614 * 1. That the disputed territory belongs to her, according to the true construction of the original charters.

2. That she has done nothing to abandon, surrender, or yield up her original right to the territory, or to close inquiry into those original rights.

Against these, we maintain four propositions.

1. That the territory belongs to Massachusetts, according to the just interpretation of her original charter, and that no subsequent acts of the British crown or courts of law, nor any acts of her own, have impaired or lessened her right in this respect.

2. That the line up to which she now possesses has been seated and established by fair and explicit agreements between the two parties, executed without misrepresentation or mistake, and with equal means of knowledge on both sides; and that she has held possession accordingly, from the dates of those agreements.

3. That if all this were otherwise, Massachusetts is entitled, by prescription and equitable limitation, to hold to the limits of her present possession.

4. That Rhode Island, by her own neglect or laches, is precluded from asserting her claim to the disputed territory, if she ever had such claim, or from opening the question for discussion now.

Mr. Whipple, in reply and conclusion.

The case naturally divides itself into three separate and independent questions.

1. Did the disputed territory belong to Rhode Island by virtue of the charter of 1691, commonly called the Province charter?

2. If the court should decide that question in the affirmative, the next question will be, Has Rhode Island transferred a portion of that territory by the contracts of 1710–1718?

3. If the rights of Rhode Island were not affected by those contracts, then the third and only remaining question will be, Are they impaired, or in any way affected, by time?

I. Did the Province charter of 1691 confer this territory upon Rhode Island? The counsel for Massachusetts very correctly commence their arguments with the propositions, that inasmuch as Rhode Island has admitted this territory to be the territory of Massachusetts by the contracts of 1710–1718, and has suffered Massachusetts to remain in possession from 1710 down to the present time, that it is incumbent upon Rhode Island, in order to counteract these adverse influences, to establish a title under the charter so clear, that no two minds can possibly differ concerning it.

By this test we are willing to stand or to fall. The title of Rhode Island under the charter is so clear that no two minds can differ about it. Hardly an attempt has as yet been made to impeach it. The very statement of the question settles it.

*615 * The charter of 1628 describes the territory of Massachusetts as lying between a line "three miles north of the Merrimack River and of any and every part thereof," on the north, and a line "three miles south of Charles River, and of any and every part thereof, on the south." The lines thus limited on the north and south were to be east and west lines, parallel to each other. The southern line of Massachusetts, by the subsequent charter of Rhode Island, in 1663, is constituted the northern line of Rhode Island.

We contend that these words, yielding to them their obvious and natural import, admit of no doubt. Three miles south of Charles River, and of any and every part thereof, is no more than three miles south of Charles River, and of any and every part of Charles River. These latter words were intended to embrace all the southern curves of the river. Rhode Island contends that the northern line of Massachusetts was intended to be three miles from the Merrimack proper, or the main stream, and the southern line three miles from the most southerly part of the main stream of Charles River; that this construction is imperiously called for by the natural and obvious import of the words, and by the contemporaneous construction of all the parties, grantors and grantees, the crown and all the adjacent colonies, including Massachusetts, from 1622 down to 1710.

1. What is the obvious meaning conveyed by the words "three miles south of Charles River"? Do they comprehend a tributary stream, the head of which may be ten or fifty miles south of the Charles? Do the words "three miles west of the Mississippi River," mean three miles west of the sources of its tributary, the Missouri? Would a grant of territory (either between nations or individuals), ten miles north of the Ohio river, or any part thereof, include all the territory

two hundred miles northward, because the Wabash, its principal tributary, extended that distance north? Why have different names been assigned to tributary streams, in ancient and modern times, and by all nations, savage and civilized, if the main stream included the tributary? Have geographers or historians ever described Frankfort and Treves as cities upon the Rhine, because upon streams emptying into the Rhine? Or have they invariably been named as upon the Maine and the Moselle?

Webster defines a river to be "a large stream or water flowing in a channel toward the ocean, a lake, or *another river*. A large stream, copious flow."

Johnson says it is "a land current of water bigger than *a brook*."

In 1642, Massachusetts surveyed a small stream running from the south into the Charles, as and for the Charles River of the charter. At that early period, the main stream had acquired the name of Charles River, far to the westward of its junction with the brook. But the surveyors of Massachusetts called the
*616 brook, * Charles River, and mapped it as Charles River,—as the main stream,—omitting to lay down the river itself. As early as 1670, this brook had acquired the name of Jack's Pasture brook, notwithstanding the attempt of Massachusetts to impress upon it the name of Charles River. Before 1700 it acquired the name of Mill Brook, mills having been built upon it. All the public and private grants of towns, corporations, and individuals referred to the main stream as the Charles, and to this brook as Jack's Pasture Brook, or Mill Brook.

The people of Massachusetts made the same distinction between a river and a brook, one of its tributaries, that all the other members of the human family had made from the creation of the world down to that period. We say, therefore, that the words of the charter admit of but one construction, and never have received a different construction.

This was the construction put upon those words by the grantees of the territory and jurisdiction, and by the grantors of the territory, the Plymouth Company, and the grantors of the jurisdiction, the king and council. All the parties, Massachusetts and the grantors of Massachusetts, so understood these words, and limited their possessions accordingly.

The extended construction now contended for would have carried the northern line of Massachusetts to Lake Winnipiseogee, and an east and west line from that lake would have embraced all the State of New Hampshire, and nearly all of Maine.

But as early as December 30th, 1621, the Council of Plymouth granted to Sir Robert Gorges a territory ten miles by thirty, in the northern part of Massachusetts Bay, embracing Salem, Cape Ann, &c.

In 1628, the same Council of Plymouth granted to Massachusetts a line running east and west, three miles from the Merrimack River.

In 1629, the king and council granted jurisdiction over the territory ceded to Massachusetts by the Plymouth Council.

In November, 1629, the same Council of Plymouth granted what is now called New Hampshire, beginning at the Merrimack River.

In April, 1635, another grant was made to Mason, from said Council, of New Hampshire, with a slight difference of boundaries. In consequence of these subsequent grants as far south as the Merrimack, Massachusetts, in 1636, erected her bound-house three miles north of the Merrimack proper, near its junction with the ocean. When pressed with this fact by Mason, in the trial before king and council, in 1676, Massachusetts gave to this house the name of a possession-house. But it must be observed that Massachusetts never claimed that her territorial rights extended more than three miles north of the Merrimack proper.
*617 In the trial before * the king and council, in 1676, she formally renounced

any such claim. Her grant of jurisdiction by the king, in 1629, is over the territory (described by the same words, *verbatim*) that was granted to her by the Council of Plymouth.

The ambitious pretensions of Massachusetts to an extension of her jurisdiction over New Hampshire and Maine, the territorial rights to which were in Mason and Gorges, arose out of the fact, that, after 1636, the inhabitants of New Hampshire, being destitute of the powers of government, petitioned the General Court of Massachusetts to be taken under their government and protection. Massachusetts refused to grant these petitions for a number of years. She had erected her bound-house three miles north of the Merrimack proper. She had refused to take the inhabitants of the towns adjoining immediately north under her protection, because she was aware that her jurisdiction did not reach them. In her answer to the charge of Mason before the king and council, in 1676, she admits "that her whole management in those eastern parts was not without the reiterated and earnest solicitation of most of the people there inhabiting."

When her ambition had become fully awakened by these reiterated and earnest solicitations, she employed Woodward and Saffrey to run her north and south lines, and after discovering that a river comprehends all its tributary streams, they run their line on the north so as to comprehend New Hampshire and Maine, and on the south so as to comprehend the territory in dispute.

This extraordinary claim resulted in a series of suits, which extended over a period of nearly a century, in every one of which the pretensions of Massachusetts were overruled.

In 1676, a formal and protracted trial was had between Mason and the colony of Massachusetts, before the two chief justices of England, sitting for the king and council. The complaint of Mason and the answer of Massachusetts contained the elements of the whole controversy. Massachusetts formally renounced any claim to the territory more than three miles north of the Merrimack proper.

In a subsequent trial in relation to the rights of New Hampshire, in 1737, she filed her written claim to begin at a point three miles north of the Merrimack, where it empties itself into the ocean, and to follow the course of the river to the crotch, where the union of two tributary streams form the Merrimack proper, thus disclaiming, as she did in 1676, the whole tributary-stream principle,—the whole principle upon which she bases her right to the territory now claimed by Rhode Island.

We find, then, that Massachusetts herself, in 1636, and all the grantors of Massachusetts, the Plymouth Council, as to the territory, and the king and council as to jurisdiction, had given to these words, "three miles from
*618 Charles River," the construction which * Rhode Island now gives to them; the construction which has been given to them among all nations and in all ages.

A very faint attempt has been made to disturb the smoothness of this current of authority by a resort to contemporaneous grants of territory and jurisdiction. The result of that attempt was, that in every case where the boundary has been "a river" simply, the tributaries and sources of the river have been excluded. New York, in one instrument, came east as far as Connecticut River. She did not claim east of the river proper, to the heads of the easternmost tributary stream, but to the river itself. When the heads and sources of rivers were intended, "to the uttermost heads and sources thereof" were the expressions invariably employed.

After the most minute and widely extended search into all the grants, public and private, from 1620 down to the present period, not an instance has been found in which a boundary by a river has ever been extended beyond the river itself.

We therefore say, that the construction given to these words by the parties themselves, grantors and grantees, accords with their obvious and ordinary meaning.

But if any additional matter could strengthen these views of this question, it will be found in the fact, that in 1676 this construction was given to these words by the king and council; in 1684, the charter of Massachusetts of 1628 was vacated and declared void, and in 1691, another charter, called the Province charter, was granted. The limits of Massachusetts, both as to territory and jurisdiction, were expressed by precisely the same words as those contained in the charter of 1628. Upon these words, the grantors had impressed a certain meaning, no matter for this purpose whether the ordinary or an extraordinary meaning. The grant of 1628, unlike a grant of property, was revocable in its very nature. A grantee of jurisdiction, or other political power, holds by no other tenure than the discretion or caprice of the granting power. Massachusetts existed as a colony during the will and pleasure of the king and council. She might be deprived of a part or the whole of her jurisdiction at any moment, and with or without any sufficient cause. It belonged to the king and council to decide arbitrarily, if they chose, how much or how little should be granted or taken away. It belonged to them to explain the meaning of the terms by them employed. Their action in this respect is legislative, rather than judicial, and the effect of their action is conclusive upon all mankind. Massachusetts accepted the Province charter of 1691 from the king and council, after the same king and council had decided, in 1676, that three miles from Charles River meant from the main stream, or Charles River proper.

It is unimportant, therefore, what this court may deem to be the usual and ordinary meaning of these terms. The granting party here has explained
*619 the sense in which these terms are used in this * grant. The party to whom the grant was made knew that such was the meaning of the grantor, and by that explained and understood meaning—explained by one party, and understood by the other—must this court be governed.

On the part of Rhode Island, therefore, we say, that we do show, beyond the capacity of the human mind to doubt, that, under the Province charter of 1691, the south line of Massachusetts and the north line of Rhode Island was a due east and west line, beginning at a point three miles south of Charles River proper.

II. In the discussion of the second point, has Rhode Island parted with her right by the contracts of 1710–1718, we must consider it settled, that in 1710 she had the right, under the charter.

In order to judge fairly of the effect of these contracts, we must consider their nature and character, the main objects of the parties, their powers in relation to the subject-matter, and the terms employed to express their intentions.

In the first place, the parties agree, that both instruments constitute but one contract.

The commissioners of Massachusetts, in their report of 1791 (p. 59 of Bill), speak of the agreement of 1710–1718 as a subsisting agreement. The answer of Massachusetts throughout, but particularly in pp. 20-23, treats both instruments as forming but one contract, the agreement of 1718 being in addition, and not as a substitute, to the agreement of 1710. Nor is it contended in the argument, that the agreement of 1718 was to take the place of that of 1710.

In the next place, the sole object of the parties was to ascertain the true charter line. From 1705 to 1710, four acts were passed by Rhode Island, appointing commissioners to settle the line according to the charter. Masachusetts and Rhode Island were colonies of the mother country, and both were fully

aware that Rhode Island possessed no power to transfer any portion of her territory to Massachusetts. There was an incurable incapacity in Rhode Island to sell, and in Masachusetts to purchase, any portion of Rhode Island territory. Neither possessing the power to sell or to purchase territory, the law will presume that neither had any such object in view. It is not pretended that any consideration was paid to Rhode Island. It must, therefore, be taken as the sole object of the meeting of the commissioners in 1710, to find the dividing line, according to the charter of 1691. The contracts themselves express this as their object, in the most explicit manner. They agree, "that the stake set up by Woodward and Saffrey in 1642, being three miles from Charles River, according to charter, be allowed, on both sides, as the commencement of the line," &c. This line was admitted by the Rhode Island commissioners to be three miles from Charles River, upon the authority of a map of Woodward and Saffrey,
*620 made in 1642, as the contract * states, "now shown forth to us, and remaining upon record in the Massachusetts government." These commissioners were Governor Dudley and Governor Jenckes. They did not go upon the land, but met at the house of Dudley, in Roxbury, in midwinter, fifteen miles from the localities referred to in the map. If they had been upon the premises, there must have been a surveyor appointed, and the report would have mentioned his name. This map states that the station was three miles from Charles River, according to charter, whereas it is three miles from the head of Jack's Pasture Brook, that brook being called on the map Charles River, by the map of these sworn surveyors it appears that the station adopted by the commissioners was three miles from Charles River, according to the charter. In point of fact, it was seven miles and upwards. This map was produced by Dudley from the Massachusetts records. What it represents he represented. Jenckes confided in the integrity of this map, and admitted that the starting-point was three miles from Charles River, according to the charter. In point of fact, it was over seven. In point of fact, the Rhode Island commissioner admitted that over four miles of Rhode Island territory belonged to Massachusetts. And this admission was made upon a false representation, through the medium of false papers. This map was the work of 1642, based upon the principle asserted by Massachusetts, and exploded by king and council in 1676, and explicitly renounced by Massachusetts in 1676, and subsequently in 1737.

We have attempted to show, that it was no part of the intention of the parties to transfer acknowledged territory from one to the other, neither possessing the requisite power, but that the only object was to ascertain the line called for by the charter. Rhode Island admitted this line to be the true charter line, upon a false representation. Is she bound by it legally or equitably?

It being three miles, according to charter. Was not that fact, it being three miles, the basis of the contract? *Because* it is three miles, *if* it is three miles, as this map states, we agree to run the line such a course to Connecticut River. Suppose it turns out that one or both parties were mistaken, that they began at a station seven miles from the river instead of three, is not the admission void, on the ground of mistake? If the parties had intended to commence at the Woodward and Saffrey station, without regard to its distance from the river, without regard to its conformity to the charter, why were those words inserted in the contract? If they had intended to bind their respective States absolutely, whether the station was three miles or ten miles, why did they insert those words in the contract? Jenckes did not know whether the map was correct or not. He trusted solely to its truthfulness. But in case of error, he did not mean to be bound.

He says, "*it being* three miles, according to charter. This is my reason
*621 for agreeing * to it." But if the admission is taken to be absolute, and

not conditional, then these words are entirely without a meaning. They were inserted as the basis of the contract, or they are surplusage.

Allen *v.* Hammond, 11 Peters's Rep. 71; 1 Story's Equity, 14, *b*. Massachusetts herself has claimed the disputed territory from 1710 to the present day, not as Rhode Island territory, ceded to her by the contract, but as Massachusetts territory, under the Massachusetts charter, admitted to be such by the contracts. Page 4 of defendant's plea of 1840; Answer, pages 6–10.

It is a general principle, that where a contract is entered into for the purpose of executing the provisions of a prior instrument, by which the rights of the parties are settled, and the subordinate contract declares that it is made in pursuance of the prior instrument, that any departure from that instrument is presumed to be by mistake. A marriage settlement, declared to be in pursuance of the marriage articles, is void so far as it departs from the articles. Atherly on Marriage Settlements.

In case of a post-nuptial settlement, it is void, though it does not say that it was in pursuance of the articles, because, after the marriage is consummated, the parties have no power to depart from the articles.

This case combines three elements of a mistake, either of which is sufficient to invalidate the contract.

1. The contract declares that it was in pursuance of the charter.
2. The parties had no power to depart from the charter.
3. It was made upon misrepresentation of a material fact.

This is one answer to the effect of the contracts.

Massachusetts attempts to support them, upon the ground that the right under the charter was doubtful; that Massachusetts claimed under the tributary-stream principle still farther south; that Rhode Island claimed to Charles River proper, and that, with a knowledge of all the localities, with a knowledge that the map of Woodward and Saffrey was drawn from a tributary stream, the Rhode Island commissioners agreed to the Woodward and Saffrey station.

To this we give various answers.

1. That the right under the charter was not doubtful, but clear and conclusive. The charter gives the line three miles from a fixed and permanent object.

2. There is not a tittle of proof, that the Rhode Island commissioners either knew the localities, or that they knew that the Woodward and Saffrey station was three miles from a tributary stream. On the contrary, all the proof is the other way.

The map itself represents the station to be three miles from Charles River.

The contract states it to be three miles from the river, according to charter.

*622 The map calls the brook Charles River, * and omits a delineation of Charles River entirely. Instead of laying down the river, and the brook emptying into it, it represents the brook as the only Charles River, and the station as three miles from that only river. The contract itself states that the persons thereafter to be appointed to run the line "were to attend within six months thereafter to show the ancient line of Woodward and Saffrey, and to raise and renew the monuments." This proves that the parties to this agreement were not shown the localities. The line was not run until 1718, and then the commissioners report that they went to the station and run the line, and it does not appear that any of them went near the river, or made any admeasurement of its distance from the station. It was their duty to report all their proceedings, and the law presumes that they performed their duty.

There is another fatal objection to the ground assumed in argument. The

court is asked to presume that the commissioners from Rhode Island knew all the localities, knew also that the Woodward and Saffrey station was seven miles from Charles River and three miles from a tributary stream. If the Rhode Island commissioner knew those facts, it was a fraud in him to conceal them from the legislature of Rhode Island, and to sign a contract which represented the direct reverse,—that the station was but three miles from Charles River according to the charter, when it was seven miles and contrary to the charter. The court is asked to presume that the commissioners stated what they knew to be false. Can this be presumed? If it were true, would it not amount to a designed fraud upon the legislature of Rhode Island?

It is agreed by the answer, that the ratification of these contracts by the legislature of Rhode Island is essential to the validity. Did the legislature of Rhode Island ratify a contract establishing a line three miles from a tributary stream contrary to the charter, or three miles from Charles River according to the charter? If a knowledge of the secret facts, the localities, and the true meaning of the map was essential to bind the commissioners, was it not equally essential to bind the legislature? The obvious meaning of the contract is three miles from Charles River proper. Did the legislature ratify the contract according to its obvious and legal meaning, or according to a meaning impressed upon it by a knowledge of facts which it is not pretended they possessed?

But the whole groundwork of this presumption, which the court is asked to make, that in 1710 Massachusetts claimed from the tributary streams and not from Charles River, wholly fails; for after the decision of 1676, Massachusetts never did claim from a tributary stream.

In 1642, she claimed the right to decide which was the main stream and which the tributary, in point of fact, and she mapped out the brook as the main stream, and called it Charles River.

*623 * In 1710, she showed that map as and for a map of Charles River according to charter, and not as a map of a tributary stream.

In 1750, she took depositions to prove the fact, that the brook was Charles River proper.

In 1791, the Massachusetts commissioners say,—"The branch now called Charles River could not have been known as Charles River in 1710." The Rhode Island commissioners say,—"That the Massachusetts commissioners pointed out the brook as and for Charles River." From 1642 down to 1791, the claim of Massachusetts rested upon the fact, that the brook was the main stream, and the main stream its tributary, and they impliedly admit, that if the fact was the other way, the case was against them. Until this trial, Massachusetts has never contended for the right to begin the three miles from a tributary stream, but for the fact that the brook was the main stream.

The fact, that as early as 1640 the public authorities of Massachusetts bestowed the name of Charles River upon the main stream, far to the westward of its junction with the brook, and as early as 1670 the name of Jack's Pasture Brook upon the tributary, and that all the boundaries of the towns and private conveyances treated and called the one the main stream, the Charles River proper, and the other the brook, is proved so clearly and decisively that it is not even brought into dispute. The further fact is also proved, that it is obvious to the senses that the one is the main stream, the other but a tributary.

This conclusive proof rendered it necessary for the counsel to shift the ground of defence, and to contend for the first time during the history of this controversy, that Massachusetts has always claimed from a tributary stream as such; that, in 1710, Rhode Island knew all the localities, and intended to allow the validity of that claim, although the language of the contract is precisely the reverse.

In 1749, the Rhode Island commissioners discovered the mistake. Being unable to find the Woodward and Saffrey station, they were obliged to go to the river and measure off the three miles. They then discovered that the line of 1718 was seven miles, instead of three, from the river. They run the line to which we now claim, erected permanent monuments upon it, gave notice of their claim to Massachusetts, and have claimed to that line from that day to this.

We therefore contend:—1. That the right to this territory under the charter is established as clear and certain. 2. That the contracts of 1710 and 1718 were not intended to convey Rhode Island territory to Massachusetts, neither party possessing the power to convey or to purchase. 3. That these contracts were merely admissions that the station was three miles, when in fact it was
*624 seven, from the river. 4. That these admissions were made upon * an obviously false statement of the facts, and are not binding in law or in equity.

These are some of the leading views of the Rhode Island mind upon these vital points of the case, and we have been largely encouraged that they are unanswerable, by the fact, that notwithstanding the extraordinary power of intellect arrayed against us, they remain wholly and entirely unanswered.

Taking it for granted that what has not been answered by counsel will not be overruled by the court, we now proceed to inquire whether the jurisdictional right of Rhode Island, secured to her by a record of the highest and most enduring nature, has been lost through the agency of time.

To our minds it seems a clear proposition, that if time is to exert any influence over the rights of the parties in this case, that influence must be based upon principles never as yet promulgated in the code of any municipal or national law which has come to our knowledge. The artificial system prevailing in the courts of common law and equity, in England and in this country, has been more largely inflated, and made deeper and broader encroachments upon the domain of practical justice and common sense, than any previous system within the range of our learning. Yet that system, extended as it has been by ambitious book lawyers and book judges, contains no form of action capable of bringing time into hostility with any one of the rights or claims of Rhode Island, in the present case.

In the first place, the main reason why time is so prolific of presumptions against the party out of possession is founded upon the ceaseless and untiring activity of avarice. The love of money is the basis of all prescription, presumptions of grant, and statutes of limitations. It is against human experience, that any man should allow another to receive the rents and income, and other benefits of his property, for a series of years, claiming it as his own, and remain silent under such encroachment. The law presumes it more probable that there has existed a lost grant, than such an anomaly should take place. It is because the man in possession enjoys great advantages, and the man out of possession sustains great losses, that the law so readily concludes the title to be according to the enjoyment. This reason, in many cases, if not in all, would apply but awkwardly to jurisdiction,—a duty, and oftentimes an onerous, sometimes a dangerous, duty, which, instead of courting, we gladly escape from,—and not, like property, an enjoyment, a benefit, indeed, the greatest of worldly blessings in the opinion of the mass of mankind. To forego the performance of a duty does not impregnate time quite so quick with a presumption of the absence of all rights, as to forego the enjoyment, it may be, of many thousands of dollars of income, claimed by another, enjoyed by another, with a denial of our right by another.

*625 * Then, again, time quiets long possessions of property upon a principle

of policy. Property passes from parent to child, it is transmitted by will, transferred by deeds and other instruments, and in the course of forty or fifty years it acknowledges, it may be, as many distinct owners, many if not the most of whom took it for granted, that the peaceable and undisturbed possessor was the legitimate and undoubted owner. The law encourages this belief, for otherwise no improvements would be made. Heirs, devisees, and purchasers would be unwilling to hazard large expenditures, if a flaw in a deed, or even the entire loss of the paper title, could not be cured by the salutary and benign influences of a long and undisputed possession. But jurisdiction is a chaster and less prolific character. She has no heirs, or devisees, and but here and there a purchaser. Third persons will not be discouraged from making improvements by large expenditures of money, because in the first place there are no third persons connected with jurisdiction, and in the next place, jurisdiction amplifies and enlarges itself without expenditures of any kind, and the policy of the law is to restrain rather than encourage these expensive propensities. It must therefore be admitted that the application of the benign influences of time to such a subject as jurisdiction would be rather gawky, old-maidish, and ungraceful.

But suppose we bring this subject of jurisdiction within the range of all the principles applicable to property; has time any ordinance, any form of action, that can in the slightest degree affect the rights of Rhode Island? We say with the most entire confidence that it has not.

There are but three modes known to the courts of law or equity, in which time exercises her influences upon permanent property:—1. By statutes of limitations; 2. By prescription; and 3. By presumptions of grants.

It is not pretended that statutes of limitations can apply to the case of two states. It would be equally absurd to invoke the common law doctrine of prescription, as administered at law or in equity, for to this day, in England and in this country, prescription is overthrown if the person out of possession can show that the possession commenced at any time subsequent to the 1st of Richard the First. Best on Presumptions (47 Law Library), 75; Taylor *v.* Cooke, 8 Price, 650; 2 Bl. Comm. 31; Fisher *v.* Greaves, 3 Eagle & Younge, *Tithe.* C. 1100.

"The presumption of prescriptive rights, derived from enjoyment, is instantly put an end to, where the right is shown to have originated within the period of legal memory," that is, 1 Rich. 1, (1189).

Massachusetts was not settled until 1620, and the charter under which she claims was granted in 1628.

*626 In the first two modes in which time operates upon title she * acts alone, unaided by any other proof, direct or circumstantial. If the period required by the statute of limitations has transpired, or if the possession has been as far back as memory extends, the law presumes that it was coeval with Richard the First, and in both cases time alone constitutes a legal title.

But with the exception of the case of a mortgage, and one or two other analogous cases, time alone, unaided by circumstances, is never sufficient for the third form of its action, by way of presuming a grant.

In Mayor of Kingston *v.* Horner, Cowper, 102, Lord Mansfield says,—"A jury is concluded by the statute of limitations. So in the case of prescription, if it be time out of mind, a jury is bound. Any evidence showing a time when the claim did not exist is an answer to prescription." p. 109.

"But length of time, as evidence, may be left to a jury to be credited or not, according to circumstances."

"There is no positive rule which says that one hundred and fifty years, or any other length of time within memory, is a sufficient ground to presume a charter."

The more modern authorities are all collected in Best, and the well settled doctrine in England and in this country now is, that the presumption of a grant is a case of circumstantial evidence, of which time constitutes but a single link.

A jury must believe that a grant was actually made. 6 Cowen, 706; 3 Johns. R. 109, 269; 1 Wash. C. C. Rep. 70; 2 Wend. 13–15; 3 Conn. etc. R. 431; 11 East, 279; 5 Barn. & Ald. 228; 3 Ibid. 150.

This court, in Ricardo *v.* Williams, 7 Wheat. 59, say,—"Presumptions of grant can never arise where all the circumstances are consistent with the non-existence of a grant. *A fortiori,* they cannot arise when the claim is of such a nature as is at variance with the existence of a grant."

The facts of this case conclusively show, that no presumption of a grant (other than the charters and the contracts of the parties, upon the construction of which the case depends) can for a moment be indulged in; because,—

1. From 1628 down to 1775 there was no power competent to make a grant except the mother country. Massachusetts and Rhode Island were colonies, and it is not denied that, up to 1775, they were incompetent to convey territory or jurisdiction.

2. No other grant from the crown can be presumed (than the charters of 1628, 1691), enlarging the limits of Massachusetts, because all such grants are enrolled, and by the well settled law of England an enrolment cannot be presumed without proof of a spoilation or hiatus in the record. In 3 Barn. & Ald., 150, Abbott, C. J., says,—"No instance can be found, where the *627 court have * said that an enrolment has been presumed." See, also, Best Presumptions, 149.

But such enlarged grant must not only have been recorded in England, but in Massachusetts and in Rhode Island, and no such grant would have been made without the most formal notice to both the parties to be affected. No confirmation of the contracts of 1710 and 1718 can be presumed, for the same reasons. Such confirmation must have been upon notice, and would have appeared upon the records of the mother country and both the colonies interested.

III. Any additional grant from the mother country, or from Rhode Island, after 1775, is not only inconsistent with the circumstances of the case, but at war with its whole history from 1710 to the present time. Because any grant prior to 1775, or any confirmation of the contracts of 1710 and 1718, would have been enrolled in the mother country, and upon the records of both Massachusetts and Rhode Island, and any grant by Rhode Island since 1775, or confirmation of the contracts of 1710 and 1718, must have been recorded in Massachusetts and Rhode Island. Some human hands must have touched these grants or confirmations, and some human eyes must have seen them, and when lost from all three of their beds of repose, a hiatus, or lost stick, must have appeared upon the record-books.

How is the fact? The mistake in the admissions of the Rhode Island commissioners (we omit to call it an imposition) was not discovered until 1748. From that time down to 1825, scarcely a year has elapsed during which commissioners from both the States have not been appointed, or continued under former appointments, for the purpose of settling this long-pending dispute. Frequent meetings have been had. All their conversations, arguments, and claims have been in writing, and reports of those conversations made to the respective legislatures of the two States. From the first to the last, no pretence has been made of any hiatus in the records in England, or in either of the two States. Not a syllable has been lisped of any other title than the charters of 1628 and 1691. From first to last, the claim of Massachusetts has been, and now is, that the territory was hers by charter, that the contracts of 1710 and 1718 conceded the territory as the chartered right of Massachusetts.

It is admitted, it is made the sole foundation of the opposite argument, that, as long ago as 1642, Massachusetts surveyed this territory, and took possession up to the Woodward and Saffrey line, by virtue of the charter, that she has occupied and claimed it from that time down to the present by virtue of the charter. All this is irreconcilable with any other title. Besides, during the period from 1748 down to 1825, neither party, in their various and frequent discussions, pretended that any other question existed between them than what was the proper
*628 construction of the charter. Both * admitted that the whole title rested upon that instrument. Massachusetts contended that Jack's Pasure Brook was the main stream in 1710 and 1718, though it had since become a tributary, and Rhode Island contended that it always had been a tributary. As late as 1791, the Massachusetts commissioners, in their report, recommended to their legislature that that question should be referred to arbitrators. In 1750, Rhode Island run the line three miles from Charles River, erected permanent boundaries upon it, gave to Massachusetts a map of that line, with notice that she claimed to it. Here, then, Massachusetts was put upon her defence as early as 1750. Her line, four miles south of ours, was claimed by her as the true charter line. Ours was claimed by us as the true charter line. From that day to this our monuments have stood upon that line, and from that day to this our commissioners have claimed to it. It has been a continual claim. In 1750, Massachusetts took the depositions of witnesses, in order to preserve the evidence of her construction of the charter. All her evidence in favor of that construction is in the case. She knew, then, that at some day or other she must either concede our right by negotiation, or surrender it under legal compulsion. All the moral reasons, therefore, in favor of long possession have no application here. She has lost none of her evidence. The depositions of all her witnesses taken in 1750 are now in the case. None of the legal reasons apply. She took possession under her charter, and therefore can set up no other title. The whole has been a subject of constant dispute from 1750 to 1825, and therefore no presumption of a grant from Rhode Island can arise.

Indeed, it is in vain to attempt to reason upon such a question. It contradicts all our legal and moral instincts to suppose that any principle ever did or ever can exist, which would sanction or even countenance the idea that such a possession, disputed from the moment it was taken to the time of filing the bill, can have any influence upon the title of either party. The law is yet to be made which gives countenance to such gross and glaring injustice.

Mr. Justice McLEAN delivered the opinion of the court.

We approach this case under a due sense of the dignity of the parties, and of the importance of the principles which it involves.

The jurisdiction of the court having been settled at a former term, we have now only to ascertain and determine the boundary in dispute. This, disconnected with the consequences which follow, is a simple question, differing little, if any, in principle from a disputed line between individuals. It involves neither a cession of territory, nor the exercise of a political jurisdiction. In settling the rights of the respective parties, we do nothing more than ascertain the true boundary, and the territory up to that line on either side necessarily falls within the proper jurisdiction.

*629 * James the First, on the 3d of November, 1620, granted to the Council established at Plymouth the territory on the Atlantic lying between forty and forty-eight degrees of north latitude, extending westward to the sea. And on the 19th of March, 1628, the Council of Plymouth granted to Henry Roswell

and others the territory of Massachusetts, which was confirmed by Charles the First, the 4th of March, 1629. This grant was limited to the territory "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof; and also all and singular the lands and hereditaments whatsoever, lying and being within the space of three English miles to the southward of the southernmost part of Massachusetts Bay; and also all those lands and hereditaments whatsoever, which lie and be within the space of three English miles to the northward of the Merrimack River, or to the northward of any and every part thereof," extending westward the same breadth to the sea.

On the 13th of January, 1629, the Council of Plymouth granted to the colony of Plymouth, which on the same day was sanctioned by Charles the First, "all that part of New England, in America aforesaid, and tract or tracts of land that lie within or between a certain rivulet or runlet there commonly called Coahasset towards the north, and the river commonly called Narraganset River towards the south," &c.

The Council of Plymouth surrendered its charter to the king the 7th of June, 1635. On the 23d of April, 1662, Charles the Second granted the territory of the colony of Connecticut, "bounded on the east by Narraganset River, commonly called Narraganset Bay, where the said river falleth into the sea; and on the north by the line of the Massachusetts plantation," &c.

The charter of Rhode Island was granted the 8th of July, 1663, by Charles the Second, limited on the north by the southerly line of Massachusetts.

It thus appears that the disputed line is the common boundary between Massachusetts and Rhode Island; the latter lying south of the line, and the former north of it. The true location of this line settles this controversy.

More than two hundred years have elapsed since the emanation of the Massachusetts charter, calling for this boundary; and more than one hundred and eighty years, since the date of the Rhode Island charter. In looking at transactions so remote, we must, as far as practicable, view things as they were seen and understood at the time they transpired. There is no other test of truth and justice, which applies to the variable condition of all human concerns.

The words of the Massachusetts charter, "lying within the space of three English miles on the south part of Charles River, or of any or every part thereof,"

do not convey so clear and definite an idea as to be susceptible of but one
*630 construction. Whether * the measurement of the three miles shall be

from the body of the river, or from the head-waters of the streams which fall into it, are questions which different minds may not answer in the same way. That the tributary streams of a river, in one sense, constitute a part of it, is clear; but whether they come within the meaning of the charter is the matter in controversy. The early exposition of this instrument by those who claimed under it is not to be disregarded, though it may not be conclusive.

This line is said to have been often a matter of controversy between the Plymouth colony and Massachusetts, as early as 1638, and that in that year Nathaniel Woodward took an observation upon part of Charles River, 41° 50′ north latitude. In 1642, the southern bounds of Massachusetts were ascertained by the said Woodward and Solomon Saffrey, who fixed a station three miles south of the southernmost part of Charles River. And in 1664, a line was run by commissioners from each colony, and their return was accepted by the General Court of Massachusetts, and ordered to be recorded; and it may fairly

be presumed that the return was also accepted by Plymouth. This was a construction of the charter by Massachusetts, and assented to by Plymouth, that the three miles were to be measured not from the main channel of Charles River, but from the head-waters of one of its tributaries. Grants of land were made by Massachusetts and Connecticut on their common boundary, and also towns were established, without a strict regard to the line, which produced much contention. To adjust these disputes, in 1702 commissioners were appointed by the two provinces to ascertain the boundary-line. They set up their quadrant and took their observation at, or not far from, the distance of three miles south of the southernmost part of Charles River, after which they took a second observation at Bissell's house, called for in the line of Woodward and Saffrey; and it was found that Massachusetts had made grants and established towns south of the line. This line was finally established by commissioners appointed by Massachusetts and Connecticut, in which they admit the correctness of the beginning at Woodward and Saffrey's station, "three English miles on the south of Charles River, and every part thereof, agreeably to the charter."

Serious difficulties occurred between the border inhabitants of Massachusetts and Rhode Island, on account of conflicting grants, and the establishment of towns. And after much correspondence and legislative action on the subject by the respective parties, it was finally agreed to appoint commissioners to settle the line. In October, 1710, the General Assembly of Rhode Island "enacted, that whereas Major Joseph Jenks being commissionated to treat with Governor Dudley concerning the settling the bounds between the province of Massachusetts and this government; that in case Governor Dudley and himself should not
*631 agree so as to issue the * matter, then Major Jenks is hereby empowered and authorized to offer and conclude on such other terms as he may judge most proper for the interest of the colony," &c.

The commissioners of both colonies met at Roxbury, January 19th, 1710-11, and after stating the authority under which they acted, and having "examined the several charters and letters patent relating to the line betwixt the said respective governments, and being desirous to remove and take away all occasions of dispute and controversy," &c., "they agree that the stake set up by Nathaniel Woodward and Solomon Saffrey, skilful, approved artists, in the year of our Lord one thousand six hundred and forty-two, and since that often renewed, in the latitude of forty-one degrees and fifty-five minutes, being three English miles distant southward from the southernmost part of the river called Charles River, agreeable to the letters patent for the Massachusetts province, be accounted and allowed on both sides the commencement of the line between the Massachusetts and the colony of Rhode Island." Other matters were adjusted according to the line of Woodward and Saffrey, which need not be referred to. This agreement was signed by Dudley and Jenks, and by three commissioners from Massachusetts and two from Rhode Island. In March, 1711, the Rhode Island legislature sanctioned this agreement, by authorizing the line to be run in pursuance thereof, and the agreement was accepted and approved of by Massachusetts.

In 1716, and also in 1717, commissioners were appointed by Rhode Island to run the line under the agreement at Roxbury, jointly with commissioners from Massachusetts; or if the latter refuse or neglect to act, then to run the line without them. On the 17th of June, 1718, the Rhode Island legislature, after stating that the commissioners had been retarded in settling the line by the

agreement made at Roxbury, &c.,—"This assembly, taking the premises under consideration, do hereby enact, constitute, and appoint Major Joseph Jenks, and others, a committee to treat and agree with such gentlemen as are or may be appointed and commissionated, with full power, by the General Assembly of the Province of Massachusetts Bay aforesaid, for the final settling and stating the aforesaid line between the said colonies, hereby giving and granting unto the aforesaid Major Joseph Jenks and others, or the major part of them, our full power and authority to agree and settle the aforesaid line between the said colonies, in the best manner they can, as near agreeable to our royal charter as in honor they can compromise the same," &c.

The commissioners of both colonies met at Rehoboth, the 22d of October, 1718, and under their hands and seals again agreed, "that the stake set up by Nathaniel Woodward and Solomon Saffrey, in the year 1642, upon Wrentham plain, be the station or commencement to begin the line," &c. This agree-
*632 ment being returned * on the 29th of October, 1718, was accepted by the General Assembly of Rhode Island, and ordered to be recorded; and it was also accepted by Massachusetts. And a joint commission, being appointed by both governments to run the line as established, met on the 5th of June, 1719, and say,—"We, the subscribers, being of the committee appointed and empowered by the governments of the province, &c., for settling the east and west line between the said governments, by virtue of the agreement of the major part of the said committee at the meeting at Rehoboth, on the 22d of October last past, at which time the said line was fully settled and agreed, and by them directed to be by us run. Having met at the stake of Nathaniel Woodward and Solomon Saffrey, on Wrentham plain, the 12th of May, anno Domini 1719, in the morning, and computed the course of the said agreed line," &c., which line was run by them two miles west of Allom pond, and they erected monuments at different points. This return was approved by the Rhode Island Assembly.

In October, 1748, the legislature of Rhode Island appointed other commissioners to continue the line to the Connecticut River, recognizing the stake set up by Woodward and Saffrey as the place of beginning. The commissioners thus appointed having met, in 1749, twice, at Wrentham, and Massachusetts having failed to appoint commissioners to act with them, the Rhode Island commissioners proceeded to complete the running of the line. In their report they say,—"That we, not being able to find any stake or other monument which we could imagine set up by Woodward and Saffrey, but considering that the place thereof was described in the agreement mentioned in our commission by certain invariable marks, we did proceed as followeth, namely: we found a place where Charles River formed a large current southerly, which place is known to many by the name of Poppotalish pond, which we took to be the southernmost part of said river; from the southernmost part of which we measured three English miles south; which three English miles did terminate upon a plain in a township called Wrentham," &c.

These are the leading facts relied on by the respondent to establish the station of Woodward and Saffrey as the place from which the boundary-line was agreed to be run, and in fact was run. And we are now to consider how these facts and the arguments deduced from them are met by the complainant.

In the first place it is insisted, that the line run by Massachusetts, in 1642, was without authority.

There does not appear to have been any order from the crown to run this line, nor is it supposed to have been usual or necessary for the crown to give such an order, where no controversy respecting the line was brought before it.

*633 The general boundary, as named in the charter, was run and established by the colony or * colonies interested; and where there was no dispute no further action was required. The controversy in regard to their common boundary, between Plymouth and Massachusetts, which seems to have existed as early as 1638, was finally adjusted by running the line in 1664. This line was commenced at the place called the angle tree, which is said to be about two miles south of the Woodward and Saffrey station.

When the Woodward and Saffrey station was first established, neither Connecticut nor Rhode Island had a political existence. And the Plymouth colony, which in 1691, was incorporated into Massachusetts, having then a distinct political existence and a common boundary with Massachusetts, assented to the line farther south than the above station. At the time this line was run, neither Connecticut nor Rhode Island can scarcely be said to have had a political organization, as the charter of the former was dated only two years before, and that of the latter one year. Massachusetts, then, in establishing the above station of Woodward and Saffrey, and in running the line, does not seem to have acted precipitately, without authority, or in disregard of the rights of other colonies.

The misconstruction of the charter, in going more than three miles south of Charles River, is earnestly insisted on by complainant's counsel. If the words of the charter were clear and unequivocal in this respect, there would be great force in this argument. It would be decisive of this controversy, unless controlled by other facts and circumstances in the case. But who can maintain that a line to be run "three miles south of Charles River, or of any and every part thereof," is clearly limited to three miles south of the main channel of the river. Can the body of the river with more accuracy of language be called a part of it, than its tributary streams. We call that a part which is less than the whole, when we speak of any thing made up of parts. We do not call a limb a tree, but it is a part of a tree; and if a measurement is to be made from any and every part of the tree, would its branches be disregarded. When we speak of a river, we speak of it as a whole, whether we refer to it above or below a certain point; as bearing north or south, it is the river, in common language, and not a part of the river. The flowing of the water in the channel of the river gives it its name and character, and these are not changed by its length. We speak of the Upper and Lower Mississippi, but neither the one nor the other is called a part of the Mississippi. Had the Massachusetts charter been designed to limit the line to three miles south of the river, would not the language have been, "three miles south of the most southerly bend in the river."

*634 It would therefore seem that the charter may be construed favorable to the respondent. That the construction of the complainant is not a forced one is admitted; and the conclusion naturally * follows, that men of equal intelligence may differ in opinion as to the true meaning of the instrument. That Massachusetts more than two hundred years ago construed the charter as her counsel now construe it is clear, and the facts proved authorize the conclusion, that this construction was not, for many years, opposed by Connecticut or Rhode Island, and at no time by Plymouth. But the attention of the court is drawn to the northern boundary of Massachusetts, which the charter describes as "three

English miles to the northward of the Merrimack River, or to the northward of any and every part thereof;" which received the construction for which the complainant contends by the king and council.

The northern boundary-line, as claimed by Massachusetts, included Maine and New Hampshire; and it appears that Mason and Gorges, who claimed under grants, some of which were prior in date to that of Massachusetts, petitioned the king against the encroachments of Massachusetts on territory covered by their grants. The answer of Massachusetts was made, and in 1677 the question was brought before the Privy Council. The title to the land claimed by the petitioners was disclaimed by Massachusetts; and the king and council held, as to the government, "that if the province of Maine lies more northerly than three English miles from the River Merrimack, the Massachusetts patent gave no right to govern there."

In 1684, the charter of Massachusetts was vacated on a *scire facias,* by the judgment of the King's Bench, and a new charter was granted in 1691, including Maine and Plymouth, but the southern boundary, as regards the present controversy, was not changed.

The northern boundary was again brought before the king and council in 1740, when the decision was, "that the northern boundary of the province of Massachusetts be a similar curve line, pursuing the course of Merrimack River at three miles distance thereof on the north side, beginning at the Atlantic Ocean, and ending at a point due north of Pawtucket Falls; and a straight line drawn from thence due west," &c. In this decision, the call of the charter was disregarded, on a ground that the tribunal deemed equitable. From this it clearly appears, that the decision was not governed by legal principles, but was an exercise of the king's prerogative; and by the same power was the former case determined, although the opinion of the judges was taken, so that neither decision constitutes a rule in other cases for the action of a court of law. In the first case, there was a conflict of jurisdiction, which the crown had power to settle, upon principles of expediency, and although the decision purports to be founded on a construction of the charter, yet other considerations may have influenced it. The decision, however, if not regarded as authority in other cases, is entitled to respectful consideration.

*635 * To avoid the effect of the agreements in 1711 and 1718, by the commissioners of both governments, in regard to the line in dispute, the complainant alleges, that its commissioners, relying upon the representations of the Massachusetts commissioners, and the words of the charter, did believe that the station of Woodward and Saffrey was within three miles of Charles River; and that the true situation of that station was not known to the authorities and people of Rhode Island until about the year 1750.

The fact of a want of this knowledge, after the lapse of more than a century and a quarter, is difficult to establish. It certainly cannot be assumed against transactions which strongly imply, if they do not prove, the knowledge. If the Rhode Island commissioners were misled in the first agreement, as to the locality of this station, it almost surpasses belief, that, seven years afterwards, the subject of the line having been discussed in Rhode Island, and such dissatisfaction being shown by the people as to lead to a new commission, the second commission should again be misled.

It may be a matter of doubt, whether a mistake of recent occurrence, com-

mitted by so high an agency in so responsible a duty, could be corrected by a court of chancery. Except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void, on the ground of misapprehension of the facts, by either or both of the parties.

It appears, from the report of John Cushing, that he and others, being a committee to unite with a committee of Rhode Island, did meet at Wrentham, in November, 1709, agreeably to appointment, and being shown the line run by Major-General John Leverett, in 1671, the Rhode Island committee was requested to unite with the Massachusetts committee in renewing that line. But they declined doing so, alleging that they knew the line, but could not recognize it as the true one.

It appears, from several depositions in the case, that the station of Woodward and Saffrey was well known in the neighbourhood, by tradition and otherwise, by the oldest settlers at Wrentham, in the year 1750; and from Callicott's deposition in 1672, "that, thirty years before, he was present when Woodward and Saffrey established their station, measuring three miles south from a pond out of which the principal part of the river came."

From the year 1750, repeated steps were taken by Rhode Island, in various resolutions, and by appointing commissioners, at different times, to ascertain and run the line in connection with commisioners to be appointed by Massachusetts. Commissioners from both colonies met more than once; but they could make no arrangement changing the line, as established under the agreements in 1711 and 1718. Rhode Island alleged a mistake in her commissioners in the place of beginning, as the ground of these efforts. That the colonies had a right
*636 to mark out their boundaries was not denied; * but it was insisted, that they had no power, without the consent of the crown, to change the limits called for in their charters. These controversies were kept up, as Massachusetts alleges, by the border inhabitants, and others, for party effect. However this may be, they seem not to have subsided with the change of government. At one time, an arrangement was made by Rhode Island to take the subject before the king in council, but the appeal was not effected. In 1746, Rhode Island obtained a decision against Massachusetts, before the king in council, in regard to the boundary on the Narraganset Bay. This boundary was claimed by Massachusetts, after the old colony of Plymouth was annexed to it. Up to this time, no dissatisfaction seems to have been expressed by Rhode Island to the Woodward and Saffrey line; and it is deemed unnecessary to state its acts in detail subsequently, showing its objections, as they led to no practical result. They can be of no importance, except in so far as they may conduce to rebut the presumption of acquiescence from the lapse of time. From time to time, up to 1825, Rhode Island adopted resolutions, appointed commissioners to meet those which should be appointed by Massachusetts for the adjustment of this disputed line, but Massachusetts adhered to the agreements.

This is a general outline of this protracted and important controversy. The facts are not stated, where it did not seem to be necessary to state them; but their effect on the case has not been disregarded. It now only remains, by a general view, to come to that conclusion which is authorized and required by the well established principles of law.

The complainant's counsel rely mainly upon two grounds:

1. The misconstruction of the charter.

2. The mistake as to the true location of the Woodward and Saffrey station.

If the first be ruled against the complainant, the second must fall as a consequence. And as regards the first ground, little need be added to what has already been said. The charter is of doubtful construction, and may, without doing violence to its language, be construed in favor of or against the position of the complainant. In this view, the construction of the charter by Massachusetts, assented to by the old colony of Plymouth, many years before Connecticut or Rhode Island had a political organization, is an important fact in the case. Plymouth was interested in restricting the line to the calls of the charter, for the line constituted the common boundary between the two colonies. And as controversies had arisen respecting this boundary, and commissioners been appointed to settle it, the presumption is that the rights of both colonies were understood and respected in the establishment of the line. And the line thus established was two miles south of Woodward and Saffrey's station. When this
*637 station was afterwards agreed to as * the place from which the boundary was to be run, Massachusetts seems to have considered the change as prejudicial to her rights.

If the commissioners of Plymouth had construed the charter to extend only three miles south of the most southerly bend of Charles River, they could not have assented to the boundary as run. In the absence of proof, the presumption is not to be drawn that they supposed the line established was only three miles south of the river. Connecticut, after the lapse of many years, assented to the line run from the Woodward and Saffrey station as its boundary, and so did the complainant, in the most solemn agreements, as stated. These proceedings conduce strongly to establish a fixed construction of the charter, favorable to the respondent, unless it be clearly made to appear that they were founded on mistake or fraud.

Fraud is not charged, and we have only to inquire into the alleged mistake.

From the nature of this supposed mistake, it is scarcely susceptible of proof. The words of the charter used by Massachusetts in describing Woodward and Saffrey's station, as three miles south of the southernmost part of Charles River, and the statements in certain reports to the legislature of Rhode Island, and the late survey of Simeon Borden, constitute the facts relied on by the complainant as proving the mistake.

Whatever inaccuracy may be detected in the latitude or longitude of the station of Woodward and Saffrey, as given by them, or in the volume of water of the streams called for, the place being identified will control other calls. Streams are often made to change their direction by the improvements of the country, and their volume of water is increased or diminished by the same cause.

If the representations made by the commissioners of Massachusetts as to the location of Woodward and Saffrey's station, by any plausible construction, came within the charter, there was no mistake of fact on which relief can be given. To sustain the allegation of mistake, it must be made to appear not only that the station was not within the charter, but that the commissioners of Rhode Island, in 1711 and 1718, who signed the agreements, believed it to be within three miles of the river, and that they had no knowledge of a fact, as to the true location of it, which should have led them to make inquiry on the subject.

From the notoriety of Woodward and Saffrey's station in 1711, and from the fact that commissioners of Rhode Island met Massachusetts commissioners

respecting this line, at Wrentham, in November, 1709, and professed to be well acquainted with Leverett's line, as appears from the report of Cushing, it is difficult to believe that they, at least, were not acquainted with Wrentham plain, and with the station there established.

*638 * This dispute is between two sovereign and independent states. It originated in the infancy of their history, when the question in contest was of little importance. And fortunately steps were early taken to settle it, in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity, or the fairness of their proceeding. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked by the complainant?

In 1754, William Murray, then attorney-general, afterwards Lord Mansfield, was consulted by Connecticut, whether the agreement with Massachusetts respecting their common boundary, in 1713, would be set aside by a commission appointed by the crown. To which Mr. Murray replied,—"I am of opinion, that, in settling the above-mentioned boundary, the crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend his Majesty will confirm their agreement, which of itself is not binding on the crown, but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries. If the matter was open, the same construction already made in the case of Merrimack River must be put upon the same words in the same charter applied to Charles River. As to Jack's Brook, it is impossible to say whether 't is part of Charles River, without a view, at least without an exact plan, and knowing how it has been reputed."

From the settlement referred to up to the time this opinion was given by Mr. Murray, forty-one years only had elapsed. And if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the lapse of more than a century and a quarter. More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin.

The possession of the respondent was taken not only under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their

*639 powers, for they were authorized "to agree and settle * the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same." Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But

if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.

The State of Rhode Island, in pursuing this matter, has acted in good faith and under a conviction of right. Possessing those elements, in an eminent degree, which constitute moral and intellectual power, it has perseveringly and ably submitted its case for a final decision.

The bill must be dismissed.

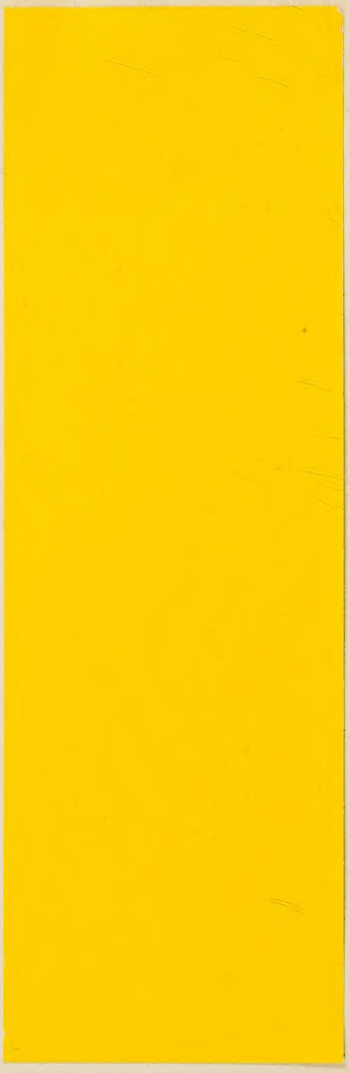
Mr. Chief Justice TANEY.

This case came before the court in 1838, upon a motion to dismiss the bill for want of jurisdiction; and that question was then very elaborately argued at the bar, and carefully considered by the court. Upon that argument, and upon full consideration, I came to the conclusion that the court had not jurisdiction over the subject-matter in controversy, and my opinion to that effect, with a very brief statement of the principles upon which it was founded, is reported in 12 Peters, 752; wherein I have intimated, that at the final hearing of the case I should examine more fully the grounds upon which jurisdiction was asserted in the opinion from which I dissented.

As the case was legally in court under this decision, it became my duty from time to time to take part in the interlocutory proceedings which were necessary to prepare and conduct the case to final hearing. But, after many unavoidable delays, it has reached that point; and we are now to determine whether Rhode Island is in this court entitled to the relief she asks for. Entertaining upon this subject the opinion heretofore expressed, and which has been confirmed by subsequent reflection, think she is not; and that this court have no constitu-
*640 tional power to decide the question in dispute * between the States, and consequently that the bill ought to be dismissed.

I concur, therefore, in the decree just pronounced, and as I do not dissent from the decree, it is unnecessary to state more fully than I have heretofore done my objection to the doctrines upon which jurisdiction was maintained.

Deciding the case, so far as I am concerned, upon this point, I of course express no opinion upon the merits of the controversy; and have not even deemed it necessary to be present at the elaborate arguments upon the evidence which have been made at the present term. For if Rhode Island had proved herself to be justly and clearly entitled to exercise sovereignty and dominion over the territory in question, and the people who inhabit it, yet my judgment must still have been, that the bill should be dismissed, upon the ground that this court, under the Constitution of the United States, have not the power to try such a question between States, or redress such a wrong, even if the wrong is proved to have been done.



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